

Funtastic Holding Limited v Milos, Inc.

2006 NY Slip Op 30188(U)

April 12, 2006

Supreme Court, New York County

Docket Number: 0111093/2005

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

WALTER B. TOLUB

PRESENT

PART 15

Index Number : 111093/2005

MILOS, INC.

vs

X

Sequence Number : 004

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

APR 25 2006

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/12/06

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
FUNTASTIC HOLDING LIMITED, ZEECO
CORPORATION, SOL ZUCKERMAN and ANNA
ZUCKERMAN,

Plaintiffs,

-against-

MILOS, INC.,

Defendant.

-----x
IN THE MATTER OF THE APPLICATION OF
MILOS, INC.
FOR JUDICIAL DISSOLUTION PURSUANT TO
BCL § 1102
-----x

WALTER B. TOLUB, J.:

By this motion Milos, Inc., seeks to reargue this court's January 20, 2006 decision as it refers to Canadian Arbitration. Specifically, Milos, Inc. argues that this court should decide who has an interest in the trademark *Milos* and what, if anything, is owned on the promissory notes. Plaintiffs seek an order granting leave to reargue the dismissal of Action No. 1, and upon such leave, summary judgment upon the remaining promissory notes held by Zeeco, Sol Zuckerman and Anna Zuckerman. Plaintiffs also seek leave to reargue the dissolution, referring the proceeding to Canadian Arbitration.

Index No. Action 1
105805/99
Index No. Action 2
111093/05
Mtn Seq. 004

FILED

APR 25 2006

NEW YORK
COUNTY CLERK'S OFFICE

Facts

Costas Spiliadis is the owner of three Greek restaurants named Milos, one in Greece, another in Montreal, Canada and yet another in New York¹. Mr. Spiliadis entered into an agreement to open a Milos restaurant in New York. In December of 1996, a series of agreements were entered into including a Shareholders Agreement ("Agreement"). The Agreement named Costas Spiliadis, David Danoor, Dennis Koundaidis, Funtastic Holdings Limited and ZeeCo as shareholders of Milos, Inc. and Costas Spiliadis, Sol Zuckerman, Dennis Koundaidis and David Danoor were named Board members.

Milos, Inc. "Milos" was formed pursuant to the laws of New York, with its principal location at 125 West 55th Street where it operated a restaurant under the name *Estiario Milos*. The Agreement provided for loans made to Milos, New York and for unresolved disputes between the parties to be resolved through mediation and arbitration pursuant to the laws of Quebec, Canada.

Action 1

The loans in the Agreement were memorialized in promissory notes (collectively "Notes"). Milos undertook certain promissory notes made to the plaintiffs as follows:

¹The court notes its misstatement in the decision dated January 20, 2006.

1. Promissory Note for \$1,000,000 dated December 15, 1997 payable from Milos to Funtastic. Funtastic is a foreign corporation, which operates in Hong Kong, China that Mr. Zuckerman introduced to Milos;
2. Promissory Note for \$1,100,000 dated January 14, 1997 payable from Milos to Sol and Anna Zuckerman;
3. Promissory Note for \$480,000 dated May 15, 1997 payable from Milos to ZeeCo. ZeeCo is a company that Mr. Zuckerman is affiliated with.

Milos and Mr. Spiliadis began an arbitration proceeding in 1996 seeking to resolve the issues of (1) the damages resulting from Mr. Zuckerman's alleged breach of obligations to Milos, (2) the amount, if any, to be paid to the holders of the Notes, and (3) an accurate apportionment of the shares of stock among the shareholders.

Due to alleged defaults under the Notes, Funtastic, ZeeCo and the Zuckermans commenced an action in 1999, Index No. 105805/99 ("Action 1"). The defendant Milos cross moved to dismiss the action pending arbitration in Canada. Five days after the cross motion, the parties entered into a Stipulation of Settlement on April 28, 1999 ("Stipulation"), which was so ordered by the late Honorable Elliot Wilk, J.S.C.

In pertinent part, the Stipulation provided that plaintiff's motion and defendant's cross motion were adjourned without date and may be restored by order to show cause or notice of motion by either party and that the defendant would make payments towards the obligations under the notes at the rate of \$15,000 per week until the total obligation was satisfied. The defendant complied with the terms of the Stipulation for roughly six years.

The plaintiff filed a motion to restore and for relief on August 5, 2005 alleging that the debt to Funtastic was fully paid off but that Milos refused to make payments to the Zuckermans and ZeeCo under the Notes as required by the Stipulation.

On July 21, 2005 Mr. Zuckerman and ZeeCo commenced an arbitration proceeding in Montreal, Quebec, Canada against Mr. Spiliadis. Among the issues requested for resolution was whether Mr. Spiliadis breached his fiduciary duty to Milos by registering the trade name "Milos" in his personal name.

Action 2

Milos then commenced a dissolution proceeding under Index No. 111093/2005 ("Action 2"). Mr. Zuckerman filed an order to show cause for:

1. Freezing payments of all the legal bills paid by Milos;
2. Directing an accounting for all legal fees paid by Milos over the past year for any reason;

[* 6]

3. Disqualifying the firm Bainton McCarthy, LLC from further representing Milos in this or any other related proceeding based upon a conflict of interest.

On September 9, 2005, Milos moved to consolidate Action 1 with the dissolution proceeding. That motion was granted by this Court.

On or about November 4, 2005, Milos moved to dismiss the Zuckermans' fifth affirmative defense, the claim that Milos and not Mr. Spiliadis owned the name "Milos."

Discussion

Milos and plaintiffs seek to reargue this court's January 20, 2006 decision as it refers to Canadian Arbitration. Milos' motion is granted and upon reargument the court stands by its prior decision but adds clarification.

The only question on a motion to reargue is whether the court overlooked or misapprehended fact or law in determining a prior motion. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very same questions previously decided. (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]) citing Fosdick v. Town of Hempstead, 126 NY 651). Moreover, a motion for leave to reargue may not include "any matters of fact not offered on the prior motion." (CPLR §2221(d)(2)).

Milos argues that because New York law governs the winding up of a corporation's affairs, that this court must decide whether Milos has any interest in the *Milos* trademark and how much if anything is owed on the Notes. The court stands by its decision that the broad arbitration clause in the Shareholders Agreement covers the underlying trademark dispute. The Shareholders Agreement states in Article 5.0 that in the event that an unresolved dispute between the parties occurs which cannot be immediately resolved by the Agreement of the parties, then the issue shall first go to mediation and then arbitration. The issue of whether Milos has an interest in the trademark *Milos* and whether Mr. Spiliadis breached his fiduciary duty to Milos by registering *Milos* in his personal name is before an arbitration panel in Canada (In the Matter of Arbitration of: Sol Zuckerman and Zeeco v. Costas Spiliadis and Milos, Inc. and David Danoor and Dennis Kounadis and Funtastic Holdings LTD.). The decision to dissolve Milos, Inc., still stands and is unaffected by the Arbitration proceedings. NYBCL §1005 states that after dissolution, the corporation shall carry on no business except for the winding up of its affairs and the corporation shall proceed to wind up its affairs by doing all acts appropriate to liquidate the business. In this case, one of those acts which Milos must perform in order to wind up its affairs is to attend arbitration. Once a decision is rendered by the Arbitration

panel then Milos will be able to move forward and continue winding up its affairs.

Milos also argues that Plaintiffs waived their right to arbitrate the trademark issue, however, Milos now offers this argument for the first time. This argument, being new, is inappropriate for both a motion to renew and/or reargue and is therefore rejected.

Therefore, Milos' motion to reargue is granted. Upon reargument the court stands by its prior decision that the corporation should be dissolved. Plaintiffs' motion to reargue the Corporation's dissolution is granted and upon reargument this court stands by its January 20, 2006 decision to dissolve Milos, Inc..

Inasmuch as both parties seek to reargue this court's decision to arbitrate issues surrounding any outstanding promissory notes, the parties' motions are granted. Upon reargument the court grants Zeeco, Sol Zuckerman and Anna Zuckerman's motion for summary judgment upon the remaining promissory notes.

No party has challenged the Notes at issue themselves, these notes are unambiguous and enforceable. An agreement should be enforced in accordance with its written terms, and the words in a contract retain their plain and ordinary meaning, unless the parties specifically provide otherwise. (Allied Chemical Corp.

v. Alpha Portland Industries, Inc., 58 AD2d 975 [4th Dept 1977])).

Where an Agreement's language is plain on its face, the court should not look beyond the four corners of the document in question. (Serna v. Pergament Distributors, Inc., 182 AD2d 985 [3rd Dept 1992]). It follows that the Notes must be interpreted in accordance with the plain language of the documents.

Accordingly it is

ORDERED that Milos motion to reargue this court's January 20, 2006 decision as it refers to Canadian Arbitration is granted and upon reargument the court stands by its prior decision that the trademark issues are to be resolved by the Canadian Arbitration Panel; and it is further

ORDERED that Plaintiffs' motion for leave to reargue the dissolution of Milos is granted and that upon reargument the court stands by its decision dated January 20, 2006 to dissolve Milos, Inc.; and it is further


ORDERED that both parties' motions to reargue this court's decision to have issues surrounding the Promissory Notes decided by the Canadian Arbitration Panel are granted. Upon reargument the court grants Plaintiffs' motion for summary judgment upon the remaining promissory notes held by Zeeco Corporation and Anna and

Sol Zuckerman and a hearing is to be held to assess the amounts due on the Notes.

Counsel for both parties are directed to appear for a hearing on the amounts due on the Promissory Notes on May 11, 2006 at 11:00am at 60 Centre Street, room 335.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/12/06



HON. WALTER B. TOLUB, J.S.C.

FILED
APR 25 2006
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