

Matter of DaSilva

2008 NY Slip Op 30533(U)

February 26, 2008

Surrogate's Court, Nassau County

Docket Number: 0345928/2007

Judge: John B. Riordan

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of Antonio DaSilva,
as President of F&D Live Poultry, Inc., to Compel the
Estate of

File No. 345928

Dec. No. 789

MANUEL R. DaSILVA,

Deceased,

to Deliver Shares of Stock to F&D Live Poultry, Inc.

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In this proceeding to compel the executor of the decedent’s estate to deliver shares of stock to F&D Live Poultry, Inc. (F&D), the petitioner, Antonio Da Silva, the president of F&D, moves for summary judgment. Gilberto P. DaSilva, the executor of the estate of Manuel R. DaSilva, has opposed the motion.

The decedent died testate on November 22, 2005, a resident of Nassau County. On May 16, 2007, his last will and testament dated June 28, 1995 was admitted to probate and letters testamentary issued to Gilberto.

On May 1, 1975, the decedent and an individual named Alfredo Felgueriras, individually and as shareholders, entered into a shareholders’ agreement with respect to F&D. At the time the agreement was signed, each of them owned fifty percent of the shares of F&D. The agreement defines “Shareholders” as the decedent and Alfredo collectively and “Shareholder” as the decedent and Alfredo individually. The agreement denominates F&D as the “Company.”

The agreement contains certain restrictions as to the ownership and conveyance of the shares. The relevant provisions are as follows:

“2. Authorized Transfers. Any Shareholder may transfer all or any portion of his shares to his spouse, children or remoter issue, or to a trust, the sole beneficiaries

of which are such spouse, children or remoter issue, or any of them, or to a corporation with respect to which such Shareholder is the beneficial holder of at least fifty-one (51%) percent of the outstanding shares of all classes of equity securities. . . .

4. Termination of a Shareholder. If any Shareholder shall cease to be a full-time employee of the Company, whether by reason of his death or otherwise, he or his personal representative and all persons to whom shares were transferred in accordance with paragraph 2 above, shall thereupon immediately be required to offer to the Company and to the remaining shareholder at Fair Value, the shares then held by him or them in accordance with the procedures set forth in paragraph 3

5. Death of a Shareholder. Upon the death of a Shareholder, hereinafter referred to in this paragraph 5 as the 'decedent', all of the shares owned by him and to which he or his personal representatives shall be entitled shall be sold and purchased as herein provided.

(a) Obligation of Company to Purchase.

The Company shall purchase from the decedent's personal representatives, and the decedent's personal representatives shall sell to the Company, all of the shares owned by the decedent and to which the decedent or his personal representatives shall be entitled, at Fair Value as set forth in paragraph 6 hereof."

The shareholders' agreement also addresses the logistics of the sale of the stock to F&D and the manner in which the purchase price of the shares is to be calculated. The agreement provides that the shares are to be purchased at "fair value", as that term is defined in the agreement, at a closing to occur between ten and ninety days after the date of the qualification of a personal representative of the estate. The agreement states that F&D is a "close corporation" for which there is "no market for the sale of its shares at a fair price either upon the death of a Shareholder or during his lifetime"

At the time of his death, the decedent owned fifty per cent pf the stock in F&D. In his will, the decedent bequeathed all of his property, including his shares of F&D stock, to his wife, Felismina P. DaSilva. Jose DaSilva Rosario, who is Antonio's father-in-law, owned the other fifty percent of the shares when the decedent died. He still owns the shares. Jose acquired his shares from Alfredo Felgueriras by agreement dated December 6, 1977, subject to the terms, restrictions and obligations of the May 1, 1975 agreement. Gilberto claims that Jose has not been a full-time employee of F&D for more than six years, an allegation Antonio does not dispute.

As a threshold matter, Gilberto questions, in his attorney's affirmation in opposition to the petition, whether Antonio, who is the president of F&D, but who does not own any shares of F&D stock, has standing to commence the proceeding on behalf of F&D. Gilberto's attorney states that he was provided with a copy of a durable power-of-attorney, signed by Jose, granting power of attorney to Antonio, presumably to commence the proceeding. Gilberto's attorney states that he has not had the opportunity to "explore the validity of the instrument, to verify Jose Rosario's signature thereupon, or to question Mr. Rosario [about the power-of-attorney]." Gilberto appears to have abandoned this argument, since it is not raised in his papers in opposition to Antonio's motion for summary judgment or in a motion or cross-motion to dismiss the proceeding for lack of standing. The Court of Appeals has held that it is an "accepted principle that where there has been no direct prohibition the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation" (*West View Hills, Inc. v Lizau Realty Corp.*, 6 NY2d 344, 346 [1959] [internal citation omitted] [citations omitted]). The shareholders' agreement provides that the shares must be offered to F&D and its shareholders. Thus, the court finds, in the absence of any evidence to the contrary,

that Antonio, as president of F&D, has standing to prosecute this proceeding on behalf of F&D.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see *Prudential Home Mtge, Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

When construing a contract, it is the reviewing court’s primary objective to “‘give effect to the intent of the parties as revealed by the language they chose to use’” in the agreement (*Kimball Assoc., P.A. v Homer Cent. School Dist.*, 2000 WL 1720751, * 4, 2000 US Dist. LEXIS 16759, *11-12 [ND NY 2000] [interpreting New York law], citing *Times Mirror Magazines, Inc. v Field & Stream Licenses Co.*, 103 F Supp 2d 711, 721 [SD NY 2000], quoting *Seiden Assoc., Inc. v ANC Holdings, Inc.*, 959 F.2d 425, 428 [2d Cir 1992] [internal quotation marks omitted]). When an agreement is clear and unambiguous on its face, it will be enforced according to its terms and without resort to extrinsic evidence (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002] [citations omitted]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990] [citations omitted]; *Russack v Weinstein*, 291 AD2d 439, 441 [2d Dept 2002]). When the intention of the parties can be gathered from within the four corners of the instrument, the interpretation of the contract is a matter of law, and no trial is necessary to determine the legal effect of the contract (*Schuler-Haas Elec. Corp. v Aetna Cas. & Sur. Co.*, 40 NY2d 883 [1976]; *Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). Thus, the court must first determine whether the agreement is ambiguous (*Kimball Assoc., P.A. v Homer Cent. School Dist.*, 2000 WL 1720751, * 4, 2000 US Dist LEXIS 16759, *12 [ND NY 2000] [interpreting New York law]).

Merely because a party to the contract asserts that the language of the contract can be interpreted in a particular way does not render the contract ambiguous “where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract”

(*Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). “A cardinal principle governing the construction of contracts is that the entire contract must be considered and, as between possible interpretations of an ambiguous term, that will be chosen which best accords with the remainder of the contract” (*Rentways, Inc. v O’Neill Milk & Cream Co.*, 308 NY 342, 347 [1955]). It is only when the language of an agreement is susceptible to multiple interpretations that a provision is ambiguous; in that case, extrinsic evidence can be used to establish the intent of the parties and the meaning is a question of fact to be resolved at trial (*Time Warner Entertainment Co. v Brustowsky*, 221 AD2d 268, 268 [1st Dept 1995]). A provision is said to be ambiguous “whenever it admits of more than one interpretation when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in a particular trade or business” (*Times Mirror Magazines, Inc. v Field and Stream Licenses, Co.*, 103 F Supp 2d 711, 722 [SD NY 2000] [internal quotations omitted] [citations omitted] [interpreting New York law]). On the other hand, a provision is unambiguous if it has a “definite and precise meaning” and there is no danger of misconception nor a basis for differing opinions with respect to it (*Breed v Insurance Co. of N. America*, 46 NY2d 351, 355 [1978] [citations omitted]).

Relying on paragraph 5 of the shareholders’ agreement, Antonio, on behalf of F&D, argues that, as a matter of law, the unambiguous terms of the shareholders’ agreement require Gilberto, as executor of the decedent’s estate, to deliver to F&D the shares of stock the decedent owned at the time of his death. According to the petition, F&D provided the attorney representing Gilberto with a fair value calculation of the stock in the amount of \$277,584, along

with supporting documentation. Gilberto rejected the offer, and has refused to sell the decedent's shares for less than \$550,000, along with a one-year lease for the premises where F&D is located.

Gilberto opposes the motion. He argues that the shareholders' agreement permits a testamentary transfer of the shares. He asserts that the shareholders' agreement is ambiguous and "so the parties' clear intent to keep the Corporation as a family-run business should control." He admits that the language of paragraph 2 is clear. However, Gilberto maintains that an ambiguity arises when paragraph 2 is read in conjunction with the rest of the agreement, specifically paragraphs 4 and 5. With respect to paragraph 4, he states that the language "seems to suggest that in order to be a shareholder in the Corporation, an individual must also be a full-time employee. . . . [N]either shareholder has been an employee of the Corporation for many years [causing] the validity of the Shareholder's Agreement being itself in question at this juncture."

The court finds that paragraph 4, when read in connection with the entire shareholders' agreement, does not render the agreement ambiguous. Moreover, there is nothing in the record to support a finding that the shareholders' agreement is invalid, regardless of whether the decedent and Jose offered their respective shares to F&D and to the remaining shareholder when they ceased being full-time employees. There simply is no evidence in the record that the agreement was deemed to be a nullity.

Gilberto also admits that the language of paragraph 5 is clear. However, Gilberto argues that an ambiguity arises when that paragraph is read with the rest of the agreement. In that regard, Gilberto argues that paragraph 5 should apply to the decedent's shares only if the decedent had not exercised his right to transfer under paragraph 2. He asserts that there is "nothing to suggest that the Agreement was meant to apply only to inter vivos transfers. In fact,

the clear intent of the parties suggests that testamentary transfers should not only be given weight, but that such transfers of company shares were expected.”

The court does not agree with Gilberto’s strained interpretation of the agreement. First, there is nothing to support his assertion that testamentary transfers of the shares were “expected” and should be accorded “great weight.” Further, even assuming for purposes of this summary judgment motion, that paragraph 2 is read to authorize a shareholder to make a testamentary transfer of his shares, paragraph 5 clearly and explicitly states that, upon a shareholder’s death, “all of the shares owned by him and to which he or his personal representatives shall be entitled *shall be sold and purchased as herein provided* (emphasis added).”

“It is a principle of substantially universal application that a will speaks and is operative from the moment of death” (*Matter of Williams*, 162 Misc 507, 509 [Sur Ct, Kings County 1937], *affd* 254 App Div 741 [2d Dept 1938], quoting *Brundage v Brundage*, 60 NY 544, 548 [1875]. It is ineffective for any purpose until the death of the testator (*Matter of Goldberg*, 275 NY 186, 192 [1937])). Consequently, the decedent owned his shares at the time of his death, and, in compliance with paragraph 5, the shares are to be sold to F&D in accordance with the terms set forth in the agreement. Accordingly, the court finds that the agreement is not ambiguous and grants Antonio’s motion for summary judgment to the extent that Gilberto, as executor of the decedent’s estate, is required to deliver the shares in question to F&D upon a determination of, and in exchange for, their fair value.

A question of fact does exist as to the fair value of the shares under the formula set forth in the shareholders’ agreement. Antonio claims that their fair value is \$277,584. However, the

record is devoid of any evidence to substantiate that figure. For that reason, Antonio's motion for summary judgment is denied with respect to the fair value of the shares. A court conference is scheduled for April 7, 2008, at 10:00 a.m., at which time the court will determine whether any additional discovery is necessary and will schedule a hearing on the issue of the fair value of the shares.

Settle order.

Dated: February 26, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court