

Murray v Navaretta

2008 NY Slip Op 30731(U)

March 7, 2008

Supreme Court, Suffolk County

Docket Number: 0023943/2004

Judge: Jeffrey Arlen Spinner

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INDEX No. ^{2396/3/04} ~~2002-11041~~

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXI SUFFOLK COUNTY**

PRESENT:

HON. JEFFREY ARLEN SPINNER

Justice of the Supreme Court

-----X
THOMAS MURRAY and 10 CARLOUGH
ROAD CORP.,

Plaintiffs

-against-

JOHN NAVARETTA ESQ. and DONN
STIPES,

Defendants

-----X

Motion Sequence: 010-MG CASEDISP
Original Return Date: 01/11/2008
Final Submission Date: 03/05/2008

**ORDER UPON DEFENDANT
NAVARETTA'S APPLICATION TO
DISMISS PROCEEDINGS**

Before the Court is a written application brought on by Order To Show Cause dated December 14, 2007. The applicant, Defendant JOHN NAVARETTA ESQ. seeks an Order of this Court dismissing the within action pursuant to CPLR 3211(a)(7). The motion was filed subsequent to the commencement of a bench trial herein. The application has been vigorcusly opposed by counsel for Plaintiffs. Oral argument was had before the Court on March 5, 2008 and the matter was thereafter deemed to be fully submitted.

A brief recitation of the history of this matter is essential to foster an understanding of the instant application. On May 18, 2001, 10 CARLOUGH ROAD CORP. was incorporated by Defendant NAVARETTA and thereafter, on May 22, 2001, it purchased a parcel of commercial real property located at 10 Carlough Road, Bohemia, Town of Islip, New York, which was utilized for the purposes of adult entertainment. The majority shareholder thereof was purported to be one Roger Koenig, a client of NAVARETTA, who died intestate on June 15, 2002, leaving his widow Renada Koenig as his sole distributee. It is undisputed that there were no corporate minutes, waivers, indicia of election or other documents contained within the corporate kit, save for the blank template forms customarily provided by various legal publishers.

Although no competent documentary evidence exists to prove the extent of ownership of the corporation, NAVARETTA has asserted a claim thereto in various percentages. Plaintiff THOMAS MURRAY had been involved with Roger Koenig in a number of financial ventures and he, too, asserted a *post-mortem* claim of ownership to the corporation. To add further complexity, Co-Defendant DONN STIPES, a tenant of the corporation, had also been engaged in various business dealings with Roger Koenig and, like Messrs. MURRAY and NAVARETTA, claimed some degree of ownership interest in the corporation subsequent to Roger Koenig's demise. After lengthy negotiations and multiple contacts between the parties, MURRAY, on April 8, 2004, purchased the shares of the corporation from Renada Koenig for some \$ 175,000.00 (occurring subsequent to her petition for Letters of Administration dated March 4, 2004, which disclosed the real property as an asset but curiously made no mention of the corporation). At the time of the purchase, MURRAY had actual written notice of NAVARETTA's claim to a portion of the corporation and he, MURRAY, obtained a duplicate corporate kit with which he could commence operations.

Plaintiff caused this action to be commenced on October 13, 2004. The complaint filed by Plaintiff contains two causes of action, both sounding in equity. The first demands judgment directing Defendant to surrender up and deliver all corporate books and records to Plaintiff while the second demands a judgment declaring Plaintiff MURRAY to be the sole shareholder of Plaintiff 10 CARLOUGH ROAD CORP. It is germane to note here that the complaint was verified on September 27, 2004 by Plaintiff MURRAY and not by his counsel.

Subsequent proceedings ensued, culminating in the filing of a Note of Issue by Plaintiff on February 24, 2006, which sought a bench trial and stated verbatim, in pertinent part, "*Amount Demanded \$0.00.*" By Notice of Motion dated March 16, 2006, Plaintiff moved to strike a jury demand filed by Co-Defendant STIPES on the ground that the action sought only equitable relief. Counsel's affirmation stated, in paragraph 10 thereof, that "*In this particular matter, not one of the parties has raised a claim, cross-claim or counterclaim for a sum of money; the only relief sought is equitable in nature.*" Further, in paragraph 11, counsel stated, in pertinent part, that "*The heart of the claim in this case is for declaratory relief and a permanent injunction...At no point in this action has Plaintiff sought money damages.*" Plaintiff then unsuccessfully moved for summary judgment, same having been denied because the Hon. Robert W. Doyle, J.S.C. found that there were triable issues of fact as to whether or not Roger Koenig was the sole owner of the corporate stock at the time of his passing.

The parties were referred to the undersigned by the Calendar Control Part for trial without jury. On August 2, 2007, Defendant NAVARETTA withdrew all of his claims, acceded to those of Plaintiff insofar as the declaratory judgment was concerned, and relinquished to Plaintiff any interest that he may have had in the corporation.

Thereafter, Co-Defendant STIPES withdrew his intervenor action, allowing this matter to move forward as to damages only. On September 10, 2007, the Court commenced a hearing in damages wherein Plaintiff was now demanding recovery of attorney's fees, back rent, lost income and punitive damages, all allegedly resulting from Defendant NAVARETTA's affirmative conduct. Plaintiff's claim for punitive damages was based, in large part, upon various discrepancies contained within a plethora of documents, both sworn and unsworn, that were attributed to or drafted by NAVARETTA. The Court denied Plaintiff's application to, in effect, withdraw his withdrawal and to reinstate his claims against Plaintiff and the matter was directed forward. The instant Order to Show Cause was brought on December 14, 2007, which stayed the pending trial.

Counsel for NAVARETTA argues that since Plaintiff's action is one sounding in equity only, money damages are inapposite, especially so in light of the express language of Plaintiff's complaint, coupled with the Note of Issue and the Motion to Strike Jury Demand. Counsel adroitly asserts that the stated objective of this suit was two-fold, a surrender of the books and records and a declaration that Plaintiff is the sole shareholder. Since these ends have both been attained, it is urged upon the Court that dismissal is appropriate.

Counsel for MURRAY responds that Defendant was fully aware of Plaintiff's intention to seek money damages, especially in light of paragraph 22 of the complaint which states that "*By reason of the foregoing, plaintiffs have been damaged in a sum not yet known and not yet capable of calculation or estimate, and plaintiffs lack an adequate remedy at law.*" In an effort to support his position, MURRAY has filed an Affidavit in Opposition dated March 11, 2008, the first nineteen paragraphs of which constitute what would most aptly be characterized as an *ad hominem* assault upon his prior counsel, a stentorian attempt to disavow and repudiate all of counsel's previous actions in this matter insofar as the lack of a claim for money damages is concerned.

The verification appended to the Complaint was subscribed and sworn to by MURRAY on September 27, 2004, and it stated that he had read and understood the contents of the Complaint. Juxtaposed with this sworn statement are the contents of the March 11, 2008 Affidavit which are diametrically opposed thereto. This necessarily causes the Court to invoke the authority of *Pimpinello v. Swift & Co.* 253 NY 159 (1930) wherein it was held that "*...the signer of a deed or other instrument expressive of a jural act is conclusively bound thereby,*" 253 NY at 162. Plaintiff cannot attempt to disavow his prior sworn statement by now claiming that he did not authorize it.

While MURRAY and his present counsel have expended a great deal of energy, together with innumerable reams of paper exhorting this Court to severely punish NAVARETTA for his conflicting statements, which have been frequently characterized by them as "perjurious", a dispassionate and objective review of the record reveals same to be replete with a plenitude of sworn statements uttered by MURRAY that are at least as conflicting and irreconcilable as those attributed to NAVARETTA.

While it is true, as urged by Plaintiff's counsel, that a settlement concluded by counsel without the consent of the client is voidable, Giannakoulopoulos v. Koukoumelis 164 Misc 2d 541 (Sup. Ct. Queens County, 1995), the case at bar does not deal with a settlement, but instead with the theory upon which the Plaintiff's case was commenced. Likewise, while correct, as posited by Plaintiff's counsel, that an attorney may neither waive nor surrender the client's substantial rights without consent, City of New York v. State of New York 40 NY 2d 659 (1976), this too differs from the instant matter by virtue of the facts recited hereinabove. It is clear to this Court that Plaintiff's prior counsel moved forward in a manner that was directed by Plaintiff and hence, counsel's acts were properly binding upon Plaintiff notwithstanding his averments to the contrary, Link v. Wabash R.R. Co. 370 US 626 (1962).

Finally and sadly, Plaintiff's vocal and written submissions, when considered in light of the facts and the law, impress the Court as nothing more than vicious harangue and sanctimonious diatribe, both of which constitute a disgraceful attempt to vacuously impugn the reputations of Plaintiff's former counsel, Defendant's counsel and the Defendant himself. In rendering its determination, the Court will not allow itself to be influenced by such scurrilous gammon and riotous claptrap.

It is, therefore,

ORDERED that the application by Defendant JOHN NAVARETTA ESQ. For dismissal pursuant to CPLR 3211(a)(7) shall be and the same is hereby granted in its entirety.

Settle judgment.

Dated: March 7, 2008
Riverhead, New York



HON. JEFFREY ARLEN SPINNER
J.S.C.

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