SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

LISA NOUTSIS and PANACIOTIS NOUTSIS,

Plaintiffs,

INDEX NO.: 011783/2007
MOTION DATE: 05/05/2008
MOTION SEQUENCE: 002

-against-

THOMAS GUNN,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed 1
Affirmation in Opposition and Memorandum of Beth A. Swendsen-Dowd, Esq., Affidavit & Exhibits Annexed 2

This motion by plaintiffs for an order pursuant to CPLR 3212 granting summary judgment declaring that they are shareholders of a non-party defendant corporation, Auto Check Corp., and granting them access to the property under the control of the third shareholder, defendant Gunn, at 2129 Merrick Road, Merrick, New York, is determined as follows.

Plaintiffs commenced this action to recover damages allegedly resulting from defendant, Thomas Gunn's, misappropriation, secretion, disposition and spoiling of Auto Check's assets. Plaintiffs allege that the parties are equal shareholders. Although the caption does not so state, plaintiffs' claim is in the nature of a shareholders derivative suit as it seeks a "vindication of their rights as shareholders, and recovery of corporate assets ... diverted from them in that status." Wolf v Rand, 258 A.D.2d 401,

403 (1st Dept 1999). Indeed it is the assumption of control of the property occupied by Auto Check Corp. by one shareholder that drives this action. Defendant's cross claims are similarly on behalf of the corporation Auto Check notwithstanding that he does not recognize plaintiffs as shareholders. It appears, that defendant argues plaintiffs are not shareholders because they did not pay $75,000 each to become shareholders. See B.C.L. § 626.

For some years defendant did business under the name of Auto Check, then in June of 2000, he incorporated it. He had held the lease to 2129 Merrick Road since 1996, but assigned it to Auto Check when it was incorporated. Historically, defendant used part of the property for a car repair shop and leased part of the lot to unrelated entities. In or about the summer of 2005, plaintiffs entered into a business plan with defendant to use the Auto Check property for the sale of used cars with Gunn providing the necessary repairs on second hand cars bought at auction. The subtenants on the property were notified to remove.

The parties seemingly had complementary experience; plaintiffs were knowledgeable about buying used cars, and had established credit, and defendant was able to repair cars and had a business relationship with supplier of parts. In aid of the venture, in August 2005 the parties incorporated an entity known as GNN Used Car Corp. It is not clear that it did any business.

On January 19, 2006, Plaintiffs also signed a document denominated "Shareholders Agreement." Plaintiff argues that the aforesaid agreement makes them each 1/3 shareholders of Auto Check. As can be gleaned from defendant's answer, the parties learned upon application to NYS DMV that the chance of being issued a license to sell used cars was greatly improved if the applicant was an established business, and if it was a lease holder. Answer ¶ 19. Therefore, the parties executed the Shareholders Agreement for Auto Check which was in fact issued a license to sell the used cars on March 17, 2006.

After the parties were in business for about three months, and had bought cars and apparently sold some, defendant barred plaintiffs' entry onto the premises. There is no explanation for this act, and it remains status quo.

In response to plaintiffs single cause of action defendant asserts a counter claim

for damages he incurred while the parties did business together. He claims that he lost business income from the curtailment of Auto Check's existing repair business, as well as losing his subtenants, that he individually put $40,000 into the business, and he seeks reimbursement for parts and labor dedicated to repairing certain used cars for sale. But, primarily, he claims that the plaintiffs promised and agreed to infuse the sum of $75,000, each, into the business and failed to do so. Defendant appears to acknowledge that plaintiff, Panaciotis Noutsis, had put money into the business which was returned to him when he moved to Greece. It seems there is confusion about whether it was $50,000 or only $33,000. In any event $50,000 was returned to Panaciotis who directed it to Joseph Noutis. As stated above, the legal relief requested in defendants' answer with counter claim is cast in terms of damages. Yet, his conduct can be understood to mean that he also believes that plaintiffs' share holder status in Auto Check Corp. is a nullity.

The issue before the court on the motion sub judice is whether plaintiffs are shareholders so that their entry upon the business premises of Auto Check is an enforceable right.

As a threshold matter, a clarification of the identity of the parties is warranted. Seemingly neither plaintiff, Lisa Noutsis, nor plaintiff, Panaciotis Noutsis, was actually involved in the proposed used car business. Lisa Noutsis never was; she became a shareholder to accommodate her husband Joseph's financial circumstances. Panaciotis was involved at the outset but again Joseph was the real party in interest. It is not contested that the only sums used for funding the business were those of Panaciotis.

It is well established that "[s]ummary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law...." Brill v City of New York, 2 N.Y.2d 649, 651 (2004). In order to establish their entitlement to summary judgment granting plaintiffs access to the Auto Check property, the shareholders are required to submit documentation or proof in admissible form showing that they are shareholders. To determine whether plaintiffs have established a prima facie case the Shareholders

Agreement of Auto Check Corp must be scrutinized.

It provides in pertinent part:

> WHEREAS, all prior agreements entered into between the parties hereto are cancelled and of no force and effect, and
>
> WHEREAS, THOMAS GUNN, LISA NOUTSIS AND PANACIOTIS NOUTSIS are the owners of the issued and outstanding shares of the corporation as follows:
>
> THOMAS GUNN NUMBER OF SHARES: 33 1/3
> LISA NOUTSIS NUMBER OF SHARES: 33 1/3
> PANACIOTIS NOUTSIS NUMBER OF SHARES: 33 1/3
>
> WHEREAS, by reason of the uncertainty of life and/or the possibility that one of the present shareholder parties to this agreement may wish to sell his shares in the "Corporation" and retire therefrom ...

The Agreement goes on to restrict the transfer of shares of stock. Finally,

> 18. Entire Agreement; Modification
>
> This writing is the entire agreement of and between any and all parties and supersedes [sic] all previous agreements , oral, or in writing, between the parties. No changes or modifications may be made orally. ...

The agreement is signed by each party. It is also witnessed.

The Shareholders Agreement is competent proof that plaintiffs are each one-third shareholders of Auto Check Corp. With movants having sustained their prima facie burden entitling them to judgment as a matter of law (*see,* Zuckerman v City of New York, 49 N.Y.2d 557, 562), the burden shifts to defendant to show the existence of a viable issue establishing that the plaintiffs are not shareholders as set forth in the Shareholders Agreement.

Defendant argues that the agreement to be shareholders was contingent upon plaintiffs paying $75,000 each for their third of the shares of Auto Check Corp., which it is undisputed they did not do. He argues that parol evidence of prior agreements, especially a condition precedent, is admissible if it does not contradict or vary the terms of the writing. Tropical Leasing Inc. v Fiermonte Chevrolet, Inc., 80 A.D.2d 467 (4th Dept 1981). However, the condition proposed directly contradicts the terms of the Shareholders Agreement which states that it supercedes all other agreements and

constitutes the entire agreement. Cosmos Forms v American Computer Forms, 193 A.D.2d 577 (2d Dept 1993). The unexpressed condition to the shareholders agreement that plaintiffs are only shareholders if they each pay defendant $75,000, directly contradicts the statement that they are all one-third equal shareholders. Moreover, the proof shows that they acted like shareholders in applying for a used car seller's license.

Defendant has not submitted a triable issue of fact as to whether plaintiffs are shareholders of Auto Check Corp. Zuckerman v City of New York, 49 N.Y. 2d 557. However, that is not to say that he has not raised an issue as to an enforceable oral agreement between them that they would invest money in the new venture, initially known as GNN Corp., or buy two-thirds of Auto Check Corp. The record shows that defendant surrendered sources of income when he went into the used car business. It also is not clear how the used cars were to be purchased since there is no operating agreement submitted for the courts review. It is clear from a review of defendant's exhibits that they did begin a used car business which operated from the Auto Check Corp. lot. In a sense, rather than raise a triable issue of fact as to plaintiffs' shareholder status, he affirms it by the submission of documents recording the number of cars they had. The deficiency in defendant's argument is that plaintiffs' shareholder status is not tied to their capital outlay.

Accordingly, the motion is granted to the extent that the court rules that plaintiffs are shareholders of Auto Check Corp., and it is SO ORDERED. So much of the application as seeks leave to enter onto the premises is reserved. Any harm from being excluded is compensable in money damages.

A Certification Conference shall be held before the undersigned on June 13, 2008, at 9:30 A.M.

Dated: May 12, 2008

J.S.C.