

Reznik v Silverstein, Gitlin Dental Of. P.C.
2009 NY Slip Op 30653(U)
March 17, 2009
Supreme Court, New York County
Docket Number: 602460/2008
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 56

Index Number : 602460/2008
REZNIK, LEONID
vs.
SILVERSTEIN, GITLIN
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

NYS SUPREME COURT
RECEIVED
MAR 24 2009
MOTION SUPPORT OFFICE

MOTION IS REFERRED TO JUSTICE
WITH A CORRECTED TRANSCRIPT
DECISION

FILED

MAR 25 2009

NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE III

Dated: 3/17/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MDA

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

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

-----X
LEONID REZNIK, individually and as a shareholder of
SILVERSTEIN, GITLIN DENTAL OFFICE, P.C.,
d/b/a VATRENKO, GITLIN & REZNIK DENTAL
OFFICES, P.C., suing on behalf of himself and any
other shareholders of SILVERSTEIN, GITLIN
DENTAL OFFICE, P.C., d/b/a VATRENKO,
GITLIN & REZNIK DENTAL OFFICES, P.C.
similarly situated and in the right of SILVERSTEIN,
GITLIN DENTAL OFFICE, P.C., d/b/a VATRENKO,
GITLIN & REZNIK DENTAL OFFICES, P.C.,

Plaintiff,

Index No. 602460/2008

-against-

SILVERSTEIN, GITLIN DENTAL OFFICE, P.C., d/b/a
VATRENKO, GITLIN & REZNIK DENTAL
OFFICES, P.C., and MICHAEL GITLIN and
IRINA VATRENKO

FILED

MAR 25 2009

Defendants.

**NEW YORK
COUNTY CLERKS OFFICE**

-----X
Hon. Richard B. Lowe III:

Defendants Michael Gitlin (“Gitlin”), Irina Vatenko (“Vatenko”) and Silverstein, Gitlin
Dental Office, P.C. (collectively “Defendants”), move to dismiss the complaint pursuant to
CPLR §§ 3211(a) and 3016.

BACKGROUND

The following factual background is taken from the allegations in the complaint, and
supplemented by documentary evidence where noted.

Plaintiff Leonid Reznik, individually and as a shareholder of Silverstein, Gitlin Dental
Office, P.C., d/b/a Vatenko, Gitlin & Reznik Dental Offices, P.C. (“Corporation”) suing on
behalf of himself and all other similarly situated shareholders of the Corporation, brings this
derivative action alleging, among other things, breach of fiduciary duty among the majority

002

shareholders, officers and directors of the Corporation.

The Corporation is a closely-held corporation with three shareholders owning identical one-third interests of the 200 outstanding shares of stock (66 2/3 shares per shareholder). The other two shareholders are defendants Gitlin and Vatenko. Gitlin is the director, president, and secretary of the corporation. Vatenko is the vice-president. Gitlin and Vatenko have complete and exclusive control over the money, property and affairs of the Corporation.

Plaintiff worked as an employee for a rate of \$500 per day. At some point, the parties began negotiating a partnership. Thereafter, on October 1, 2003, the parties entered into the Stock Purchase Agreement, annexed to the complaint as Exhibit A ("Stock Purchase Agreement").

The Stock Purchase Agreement, executed between the plaintiff, Gitlin and Vatenko, states, in relevant part, that the three parties are to become equal shareholders of the Corporation based on a purchase price to be paid at a closing on October 1, 2003 ("Closing"). Paragraph 2, titled "Purchase Price for the Shares", states that at the Closing Plaintiff will pay Gitlin and Vatenko a combined \$250,000, \$150,000 in cash and \$75,000 in notes ("Notes"). Paragraph 2 also contains a detailed payment schedule for amounts due under the Notes, including certain amounts of interest to be paid on the Notes.

Paragraph 5 states that plaintiff's shares of stock in the Corporation will be held in escrow until the "Purchase Price is paid in full in cleared funds, While [*sic*] the shares are held in escrow, they shall be entitled to be voted by the [plaintiff]." Paragraph 12 states that the plaintiff "shall not be entitled to receive any income from the Corporation relating to billings that were already sent out prior to Closing." Additionally, paragraph 7, states that "immediately after the

closing, [Gitlin and Vatenko] shall direct counsel for the Corporation to begin to effectuate a 'Change of Corporate Name' to: Vatenko Gitlin & Reznik Dental Offices, P.C."

Finally, paragraph 13(D) states that "[a]ny controversy or claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration."

According to the complaint, since executing that agreement, plaintiff was to continue to receive \$500 per day for work, in addition to one-third of the proceeds as per his shareholder status. However, between October 2003 and July 2004, plaintiff only received nominal dividend payments from the proceeds of the business. Subsequently, between July 2004 and January 2005, plaintiff received neither base pay nor dividends. Plaintiff further alleges that in January 2005, he received \$50,000. Since that time, plaintiff has not received any further dividend payments, while both Gitlin and Vatenko have received salaries in excess of both corporate ability and the amount paid to the plaintiff.

Plaintiff further alleges that he has requested an accounting, but since 2003, for all intents and purposes, he has been frozen out of the corporation. Additionally, the corporation has held no board or shareholder meetings.

Plaintiff alleges that Gitlin, in breach of his duty to the corporation, has maintained a separate dental practice. Plaintiff also alleges that both Gitlin and Vatenko have diverted corporate assets for personal benefit, and violated their fiduciary duties by receiving dividend payments and/or loans.

Plaintiff filed his complaint on August 22, 2008, seeking, among other things, an accounting for all years between 2003-2008, valuation of the shares of the Corporation, and restitution for diverted corporate assets.

DISCUSSION

Plaintiff's Shareholder Status

Defendants argue that the plaintiff has no standing to bring these claims because he never became a shareholder in the Corporation due to plaintiff's own failure to complete the purchase of shares. In support, Defendants submit an affidavit by Gitlin who states that plaintiff failed to make payments under the Notes that were to commence January 1, 2004 as required under the Stock Purchase Agreement. Defendants, relying primarily on the future payment and escrow account terms, as well as the Court of Appeals decision in *Deering Milliken, Inc. v Clark Estates, Inc.* (43 NY2d 545 [1978]), argues that the terms of the Stock Purchase Agreement call for a future transfer of interest in the Corporation following full payment on the Notes.

Plaintiff argues that under the terms of the Stock Purchase Agreement, the transaction was a present transfer of interest in the Corporation. As such, Plaintiff argues he became a shareholder as of the Closing on October 1, 2003, regardless of future payments under the Notes.

In *Deering*, the Court of Appeals affirmed the Appellate Division's determination that a particular agreement for the purchase and sale of stock contemplated a future transfer of the stock. Furthermore, the lower court held that the buyer was not entitled to dividends declared before the transfer of beneficial interest in the stock (*id.* at 548). The Court stated:

A purchaser of stock acquires "by a contract of present sale a right to the benefits which may accrue on the stock bought, and that right is, for convenience, called the 'beneficial ownership' of the stock." A different result attends the execution of a contract to make a sale in the future. "In the absence of an agreement to the contrary, the buyer under an executory contract to sell stock is not entitled to dividends until the legal title to the stock has passed to him, which is not until delivery is made to him or is due to him and is offered to be made, unless there is something in the contract specifying or implying a contrary intention. * * *

Where there is a sale of stock *in praesenti*, but the date of delivery and payment is postponed, the vendee is entitled to all dividends declared between the date of the

agreement and the date of closing to the purchaser.”

(*Id.* at 549, citing *Broderick v Alexander [Kahn]*, 268 NY 306, 309 [1935]; 11 Fletcher Cyclopedia Corporations [Perm ed, 1971], § 5378.)

Therefore, according to the Court of Appeals in *Deering*, the issue of whether the Stock Purchase Agreement contemplated a present or future transfer is one of contractual interpretation. “On a motion to dismiss pursuant to CPLR § 3211(a)(1), ‘[t]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint’” (*First Am. Commercial Bancorp, Inc. v Saatchi & Saatchi Rowland, Inc.*, 55 AD3d 1264, 1266 [4th Dept 2008], *Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004]). “In interpreting a contract, the plain meaning of words and phrases should be determined and the language construed so as to give full meaning and effect to all provisions of the agreement” (*V.C. Vitanza Sons v New York City Hous. Auth.*, 7 AD3d 398 [1st Dept 2004], citing *American Express Bank v Uniroyal*, 164 AD2d 275, 277 [1st Dept 1990]). “Whether a contract is ambiguous is a question of law, and extrinsic evidence may not be considered unless the document itself is ambiguous” (*Savoy Mgt. Corp. v Leviev Fulton Club, LLC*, 51 AD3d 520, 521 [1st Dept 2008], citing *South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]).

Even though the Stock Purchase Agreement sets out a payment schedule for funds due under the Notes, the agreement sets out an *in praesenti* (or immediate) transfer of interest in the corporation at the Closing. This intent is illustrated by the language used throughout the Stock Purchase Agreement. For instance, paragraph 2 sets out that all payment for the shares are due

at the Closing.¹ While a percentage of the payment due was to be made by transferring the Notes, paying off the Notes in future installments does not refute that the fact that the agreement considered delivery of the Notes as immediate payment for the shares at the Closing. Additionally, the funds that were to be paid under the Notes included obligations to pay interest, and as the Court in *Deering* noted, “the inclusion of an obligation for payment of interest by the buyer from the date of the contract’s execution . . . support[s] a claim of a present sale (43 NY2d at 551, citing *Currie v White*, 45 NY 822 [1871]). Additionally, paragraph 8(iv) uses the language “the shares of stock being transferred herein,” which reflects a present transfer upon execution of the agreement.

Defendants do not dispute Plaintiff’s allegation that the Closing took place. According to paragraph 7, the name of the Corporation was to be changed immediately after the Closing and the name change included plaintiff’s name. This is not a situation where the name would only be changed if the plaintiff made future payments under the Notes. Therefore, it follows whereby the fact that the Corporation was to change its name following the Closing, shows the parties’ intent for plaintiff to be an immediate interest holder of the professional corporation following the Closing.

Furthermore, paragraph 5 states that the shares will be held in escrow until the purchase price is paid in full. While the term “Purchase Price” is undefined, it apparently relates back to paragraph 2(A), which contemplates the purchase price being paid at the Closing. Paragraph 5 clearly states that “[w]hile the shares are held in escrow, they shall be entitled to be voted by the

¹ While Defendants argue the Plaintiff failed to make full payment under the Stock Purchase Agreement, the allegation found in Gitlin’s Affidavit does not dispute whether the funds and Notes due at the Closing were paid.

Purchaser.” This clearly reflects an intent for the plaintiff to have full shareholder voting rights once the contract was executed.

Contrary to Defendants’ argument, the future amounts due and having the shares held in escrow are not dispositive factors. Rather, the payment price included cash and Notes delivered at the Closing, and did not include future payments. Regarding the stock, although the shares were held in escrow, the plaintiff had full shareholder rights during that period. Thus, according to the plain terms of the Stock Purchase Agreement, the parties executed a present transfer of interest and the plaintiff became a shareholder as of the closing.²

Plaintiff’s complaint alleges that following the closing he became a shareholder in the closely-held corporation. Because the Stock Purchase Agreement unambiguously contemplates a present transfer of interest at the Closing and because the plaintiff makes an undisputed allegation that the Closing occurred, the Complaint sufficiently alleges plaintiff’s shareholder status. It is well-established that shareholders in a closely-held corporation owe each other fiduciary duties (*see Littman v Magee*, 54 AD3d 14, 17 [1st Dept 2008]; *O’Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282 [1st Dept 2007]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]; *Matter of Cassata v Brewster-Allen-Wichert, Inc.*, 248 AD2d 710, 711 [1st Dept 1998] [shareholders of a close corporation owe each other a duty to act in good faith]). As such, the complaint sufficiently alleges plaintiff’s shareholder and fiduciary status and the fiduciary relationship between the parties. Therefore, Defendants’ motions based on the

² Plaintiff submitted extrinsic evidence supporting his claim that following the closing the parties acted as if he became a shareholder. The Court will not examine the extrinsic evidence submitted because the Court finds the agreement unambiguously executes a present transfer of interest in the corporation.

lack shareholder and/or fiduciary status, or the Complaint's failure to allege fiduciary relationship, are denied. This includes Defendants' CPLR § 3211(a)(1) motions based on lack of standing and fiduciary duties; CPLR § 3211(a)(3) motion for lack of standing under the BCL § 626; CPLR § 3211(a)(7) motion based on lack of allegations concerning shareholder status; and CPLR § 3016 motion based on lack of allegations concerning fiduciary relationship.

Arbitration

Defendants also make a CPLR § 3211(a)(1) motion arguing that the arbitration provision in the Stock Purchase Agreement requires that this case be dismissed and the parties be ordered to arbitrate these claims. Defendants argue that the arbitration provision unambiguously covers all of Plaintiff's claims, specifically his claims for failure to distribute dividends, breach of fiduciary duty and diversion of corporate assets.

Plaintiff argues that the Stock Purchase Agreement and its arbitration clause do not cover the claims alleged in the complaint. According to the plaintiff, the Stock Purchase Agreement only sets out the terms of the purchase of shares in the Corporation, and is not intended to be a shareholders' agreement or corporate bylaws governing the entity or the parties' relationships as shareholders. In lieu of a shareholders' agreement or corporate bylaws, Plaintiff argues that the fiduciary relationships are governed by the BCL.

"A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration" and may prevail only if "a valid agreement" to arbitrate was made (CPLR 7503[a]). The initial inquiry in a proceeding to mandate arbitration is always whether there is a valid agreement to arbitrate (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc. LLP*, 6 NY3d 371 [2006]; *Kahn v Biernbaum*, 55 AD2d 589, 589 [1st Dept 1976]),

and it is for the Court to determine whether a dispute comes within the scope of an arbitration agreement among the parties (*see Sisters of Saint John the Baptist v Phillips R. Geraghty Constructor*, 67 NY2d 997 [1986]).

Whether a particular claim falls within the scope of the parties' arbitration agreement is determined by the factual allegations in the complaint (*Matter of Same Time Holdings, Ltd.*, 824 NYS2d 766 [NY County Sup Ct 2006], *citing JLM Indus. v Stolt-Nielsen SA*, 387 F3d 163 [2d Cir 2004]). If the conduct alleged implicates "the parties rights and obligations under [the primary agreement]" containing the arbitration clause or 'touches matters' covered by the primary agreement, the matter is subject to arbitration" (*id.*).

The Stock Purchase Agreement is a comprehensive agreement dictating the terms of the purchase and sale of shares in the Corporation. Plaintiff's claims set forth allegations of corporate malfeasance on the part of the defendants shareholders and directors and do not implicate allegations arising out of the purchase and sale of the shares in the Corporation. For instance, plaintiff's allegations concerning agreements for the payment for services rendered to the Corporation or payment of dividends are not governed by the Stock Purchase Agreement and, if proven, will be proven through another implied or express agreement. Plaintiff has alleged that there is no corporate bylaws or shareholder agreement governing the Corporation's business activities or the scope of the parties alleged fiduciary relationship. The Defendants have not come forward with such a shareholder agreement or corporate bylaws setting forth that the parties agreed to arbitrate disputes concerning shareholder rights. Rather Defendants rely on the Stock Purchase Agreement, which only governs the purchase and sale of shares in the Corporation (which is silent regarding fiduciary duties or general corporate governance issues),

and its arbitration clause that applies to disputes arising out of that transaction. For instance, the Stock Purchase Agreement discuss rights between a “Purchaser” and “Sellers”, and does not implicate rights related to or between shareholders.

While plaintiff’s claims consider his status as a shareholder as a *fait accompli*, his claims do not implicate the transaction. Defendants have raised issues and defenses that directly implicate the Stock Purchase Agreement, but the factual allegations contained in the complaint are determinative of whether the claims fall within the arbitration provision. As such, plaintiff’s claims are not subject to the arbitration agreement in the Stock Purchase Agreement and Defendants’ motion to dismiss and order arbitration pursuant to CPLR § 3211(a) is denied. Likewise, Defendants’ application to sanction the plaintiff for his refusal to arbitrate is denied.

Dividends

Defendants also make a CPLR § 3211(a)(1) motion for dismissal arguing that plaintiff’s claims for dividends is refuted by the Stock Purchase Agreement that does not provide for payment of dividends to shareholders. Plaintiff argues that Stock Purchase Agreement only relates to the purchase and sale of shares and does not act as a shareholders’ agreement or corporate bylaws that would alter the BCL’s general corporate governance provisions.

The Stock Purchase Agreement is silent as to shareholder rights and dividend payments. The only provision that concerns payments to the purchaser is paragraph 12, which states that the “Purchaser shall not be entitled to receive any income from the Corporation relating to billings that were already sent out prior to Closing.” While not ruling conclusively on the issue, the Court finds that this implies that the purchaser is entitled to income from the Corporation on invoices sent out following the Closing. However, the terms of what and how income is

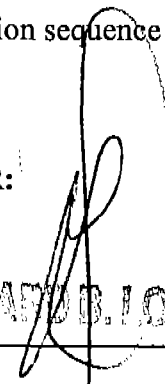
distributed to the shareholders is not discussed in the Stock Purchase Agreement. As such, whether or not the plaintiff is entitled to dividends cannot be resolved on this motion as the Stock Purchase Agreement does not conclusively resolve this issue. Defendants' CPLR § 3211(a)(1) motion based on the Stock Purchase Agreement's lack of provisions providing for the payment of dividends is denied.

CONCLUSION

Therefore, based on the foregoing, it is hereby

ORDERED that Defendants' motion to dismiss (motion sequence 002) is denied in its entirety.

Dated: March 17, 2009

ENTER:

RICHARD D. LOWE III
J.S.C.

FILED
MAR 25 2009
NEW YORK
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