

**Stevenson-Misischia v L'Isola D'Oro SRL**

2011 NY Slip Op 30044(U)

January 3, 2011

Sup Ct, New York County

Docket Number: 600122/2007

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**LOUIS B. YORK**

PRESENT: \_\_\_\_\_

PART 2

Index Number : 600122/2007  
STEVENSON-MISISCHIA, MARY  
vs  
L'ISOLA D'ORO SRL  
Sequence Number : 014  
PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

MOTION GRANTED WITH ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

JAN 10 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/2/11

Ley  
\_\_\_\_\_  
LOUIS B. YORK, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 2

-----X

Mary Stevenson-Misischia, as  
Executrix of the Estate of  
Mario Misischia,  
  
Plaintiff,

Index  
Number  
600122/2007

-against-

**FILED**

**JAN 10 2011**

L'Isola D'Oro SRL, Sud Pesca Spa,  
L'Isola D'Oro USA, Inc., Atlantic  
International Products, Inc., Casa  
Imports, Inc. and Philip Casamento,  
Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X

Louis B. York, J.:

Plaintiff seeks partial summary judgment on her causes of  
action for breach of fiduciary duty, conversion and an  
accounting.

**Parties**

Plaintiff is the executrix of the Estate of Mario Misischia  
(Mario). L'Isola D'Oro SRL (SRL) is an Italian food importer.  
Sud Pesca Spa (Sud) is an Italian food importer. L'Isola D'Oro  
USA, Inc. (USA) is a New Jersey corporation that imported food  
products from Sud and SRL. Mario was the president, a director  
and owner of 40% of the shares (the Minority Stock) of USA until  
his death on February 2, 2004 (complaint, ¶ 15). Atlantic  
International Products, Inc. (Atlantic) is a New York corporation  
based in Utica, New York that imported food products from Italy

(*id.*, ¶¶ 9, 31). Casa Imports, Inc. (Casa) is a New York corporation based in Utica, New York, which imports food products from Italy (*id.*, ¶¶ 10, 31). Philip Casamento is a shareholder and officer of both Atlantic and Casa. He began managing USA shortly before Mario's death (plaintiff affidavit, ¶¶ 13-14). The action was dismissed against SRL, Sud and USA by the court's order dated August 2, 2007 and this dismissal was affirmed by the Appellate Division, First Department (64 AD3d 458 [2009]).

**Parties' Contentions**

Plaintiff alleges that, in 2000, Mario joined with SRL and Sud to establish USA as the exclusive U.S. importer and distributor of their food products, that Mario was in complete charge of USA's operations and that he had a 40% stock ownership in USA (plaintiff affidavit, ¶ 3). Plaintiff also contends that L'Isola D'Oro di F Zarotta, s.a.s (Zarotta) owned the remaining 60% of USA stock (the Majority Stock) and that, in July 2003, after learning of Mario's illness, Zarotta sought to sell the Majority Stock to Atlantic (*id.*, ¶¶ 3, 4). She further states that Atlantic bought the Majority Stock and, since January 2004, it has exercised complete control over USA's business (*id.*, ¶ 4).

Plaintiff presents a letter dated December 13, 2003, from Sud to Atlantic's counsel (the Letter of Intent), that purportedly outlines the terms of Atlantic's purchase of the

Majority Stock (*id.*, ¶¶ 18-19). She also states that Atlantic sells food products from the Sud product line (*id.*, ¶ 23). She further contends that Casamento would not buy the Minority Stock (*id.*, ¶ 24).

Plaintiff has submitted USA's 2004 Connecticut tax return (the Tax Return) (Exhibit X). The Tax Return, Schedule G, item 3 identifies Atlantic as a majority shareholder of USA. She notes that Casamento signed the Tax Return as secretary-treasurer of USA and that it was prepared by Atlantic's accountant (Casamento EBT, at 246).

Plaintiff therefore claims that she has established that Atlantic owns the Majority Stock, that there was a breach of fiduciary duty and that there was a conversion of the Minority Stock.

Atlantic, Casa and Casamento (defendants) contend that Casamento was a shareholder in, and secretary-treasurer of, Atlantic and Casa, that Atlantic was an importer of Italian food products and Casa was a distributor of Italian food products (Casamento affidavit, ¶ 1). They assert that the Letter of Intent was not binding, since it had no closing date and it explicitly stated that it was not a binding contract (*id.*, ¶ 8). They further state that Atlantic did not buy the Majority Stock since the liabilities of USA were greater than projected

(\$504,000 instead of \$455,000), that the accounts receivable were higher than projected in the Letter of Intent and that they were of poor quality with uncertain collection and, ultimately, USA had a smaller profit (*id.*, ¶¶ 11-13).

Defendants further contend that, while gross sales for USA were approximately \$800,000 in 2002 and 2003, there was little profit in those years, that USA eventually lost money and that it ceased operations (*id.*, ¶¶ 6-12).

Casamento states that he signed the Tax Return on behalf of USA, based on his accountant's preparation, that the identification of Atlantic as a majority shareholder was an inadvertent mistake and that Atlantic never bought the Majority Stock (Casamento EBT, at 239-240, 245).

Defendants assert that Atlantic decided not to buy the Minority Stock based upon a reasonable business evaluation of USA's situation, that they never agreed to buy the Majority Stock and that the stock of USA was worthless, due to how Mario had operated the business, which resulted in high inventory and low profit.

#### **The Letter of Intent**

The Letter of Intent states that "(t)he sole purpose ... is to express Atlantic's interest in discussing the terms and conditions (of the sale of Sud's shares and) is not intended to

form a binding contract or agreement in any respect." It further provided that USA's liabilities to Atlantic at closing would not exceed \$484,976, with other liabilities not to exceed \$200,000, that current accounts receivable at closing would not exceed \$196,000 and current inventory at closing would not exceed \$200,000.

No closing date was set in the Letter of Intent. The penultimate paragraph stated that "(w)e are free to discontinue these discussions at any time." The final paragraph states that "THIS LETTER ... IS NOT A INTENDED TO BE A LEGALLY BINDING AGREEMENT (and) WE WILL NOT BE BOUND UNTIL ... EXECUTION AND DELIVERY ... OF A MUTUALLY SATISFACTORY DEFINITIVE AGREEMENT" (Capitals in original).

A document that states that it is a non-binding agreement is an unenforceable agreement to agree, rather than a binding contract (*Aksman v Xiongwei Ju*, 21 AD3d 260, 261 [1st Dept], lv denied 5 NY3d 715 [2005]). The statements in the Letter of Intent clearly set forth that it was not a binding agreement, but rather a proposal for discussion of the terms for a possible purchase of the Majority Stock.

#### **Breach of Fiduciary Duty**

To establish a cause of action for breach of fiduciary duty, "a plaintiff must prove the existence of a fiduciary

relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct" (*Fitzpatrick House III, LLC v Neighborhood Youth & Family Servs.*, 55 AD3d 664, 664 [2d Dept 2008] [internal quotation marks and citations omitted]; see also *Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]).

A shareholder in a closely held corporation owes a fiduciary duty to other shareholders (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). In particular, an active managing shareholder owes a fiduciary duty towards a minority shareholder in a closely held corporation (*Littman v Magee*, 54 AD3d 14, 17 [1st Dept 2008]).

#### **Conversion**

Conversion is the unauthorized assumption and exercise of control over money or personal property belonging to another (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; *Mirvish v Mott*, 75 AD3d 269 [1st Dept 2010]).

#### **Accounting**

A party seeking an accounting must prove a confidential relationship which induced him to entrust to the defendant money or other property and that no legal remedy exists (*Kastle v Steibel*, 120 AD2d 868, 869 [3d Dept 1986]), or that a partnership, joint venture or other fiduciary relationship exists (*Winter v Beale, Lynch & Co.*, 198 AD2d 124, 124-125 [1st Dept

1993], *lv dismissed in part, denied in part* 83 NY2d 944 [1994]), which creates the basis for an accounting.

#### **Admission**

Plaintiff seeks summary judgment, contending principally that the stock ownership issue must be resolved in her favor based upon the Tax Return.

"A party to litigation may not take a position contrary to a position taken in an income tax return ... as a matter of policy" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]). This policy is based upon equitable estoppel which prevents "a party from asserting, without ample explanation, a factual position in a legal proceeding that is directly contradicted by his or her tax return" (*Mikkelson v Kessler*, 50 AD3d 1443, 1444 [3d Dept 2008]; *Gagen v Kipany Prods., Ltd.*, 27 AD3d 1042, 1044 [3d Dept 2006]).

However, this form of estoppel "does not apply if the initial statement was the result of a good faith mistake or an unintentional error" (*American Mfrs. Mut. Ins. Co. v Payton Lane Nursing Home, Inc.*, 704 F Supp 2d 177, 194 [ED NY 2010]).

#### **Summary Judgment**

A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any

material factual issues (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). If the movant fails to make this showing, then its motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

#### **Discussion**

Applying these principles to this case, plaintiff has failed to establish her entitlement to judgment as a matter of law.

Plaintiff asserts that the issue of Atlantic's ownership of the Majority Stock is determined by the Tax Return. However, the Tax Return was not filed by Atlantic, but rather by USA, which was dismissed as a party defendant by the court's order dated August 2, 2007. Tax returns are only binding on a party (*Mahoney-Buntzman*, 12 NY3d at 422). Moreover, Casamento has provided a reasonable explanation for the Tax Return's identification of Atlantic as a majority shareholder of USA was "a good faith mistake or an unintentional error" (*American*

*Manufacturers*, 704 F Supp 2d at 194).

Plaintiff's assertions of a fiduciary relationship do not apply to Casamento or Casa, since she has not presented any evidentiary proof that they were shareholders in USA or that there was any other basis for a fiduciary relationship with these parties. Plaintiff's contention that Atlantic was a shareholder are, at best, controverted by Casamento (Casamento EBT, at 158; Azzali affidavit, ¶¶ 28-29). Her claim that the Letter of Intent supports her allegation that Atlantic bought the Majority Stock is contradicted by the Letter of Intent's explicit statement that it was not a binding contract.

Additionally, plaintiff has not established wrongful conduct by defendants in deciding not to buy the Minority Stock, in the management of USA's business and the decision to close USA. She has claimed that defendants' actions were motivated by bad faith and pointed to USA's substantial sales of \$800,000 in 2001 and 2002. In response, defendants have asserted that USA had excessive inventory, poor accounts receivable, low profits and that recognition of these financial considerations constituted legitimate business reasons for refusing to invest more in USA, declining to buy out plaintiff's Minority Stock and, ultimately, determining to close USA.

Also, plaintiff has not established that she suffered

damages, since accepting defendants' version of the facts, as the court must in deciding a motion for summary judgment (*Dauman Displays*, 168 AD2d at 205) USA was closed due to its unprofitability and its shares were worthless. The failure to purchase the Majority Stock or the Minority Stock cannot support a claim for damages, since the shares would not have any monetary value.

Resolution of these conflicting versions of the reasons for the failure to purchase USA's stock rests on determinations of credibility and, consequently, summary judgment is inappropriate. Consequently, plaintiff's motion for summary judgment is denied.

**Order**

It is, therefore,

ORDERED that plaintiff's motion for partial summary judgment is denied.

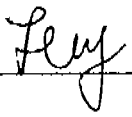
Dated: Jan 3, 2011

**FILED**

**JAN 10 2011**

ENTER:

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J.S.C.

**LOUIS B. YORK**  
J.S.C.