

Celauro v 4C Foods Corp.

2011 NY Slip Op 33673(U)

April 6, 2011

Supreme Court, Nassau County

Docket Number: 600391-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**GAETANA CELAURO, individually and as Sole Income
Beneficiary of the SALVATORE F. CELAURO
REVOCABLE TRUST and SALVATORE F. CELAURO
IRREVOCABLE LIFE INSURANCE TRUST, et al.,**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiffs,

**Index No: 600391-10
Motion Seq. No: 4
Submission Date: 2/15/11**

-against-

4C FOODS CORP., CELAURO SALES, INC., et al.,

Defendants.

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The following papers have been read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Memorandum of Law in Support.....X**
- Memorandum of Law in Opposition.....X**

This matter is before the Court for decision on the motion for reargument filed by Plaintiffs on January 18, 2011 and submitted on February 15, 2011. For the reasons set forth below, the Court denies Plaintiffs' motion.

BACKGROUND

A. Relief Sought

Plaintiffs move, pursuant to CPLR § 2221, for an Order 1) granting leave to reargue Plaintiffs' cross motion for summary judgment; and 2) on such reargument, vacating and setting aside the Decision and Order of the Court dated December 13, 2010 ("Prior Decision") denying Plaintiffs' cross motion for summary judgment and granting Defendants' motion for summary judgment. Defendants oppose Plaintiffs' motion.

B. The Parties' History

The parties' history is set forth in detail in the Prior Decision (Ex. 1 to Wicks Aff. in Supp.) and the Court incorporates that Prior Decision herein by reference. The Prior Decision addressed the following applications: 1) Plaintiffs' Order to Show Cause seeking an Order temporarily and preliminarily enjoining 4C Foods Corp. ("4C" or "Corporation"), its shareholders, officers, directors, employees, agents, and representatives from taking any action that would interfere with the transferability provisions of, including enjoining them from enacting any further Amendments to, 4C Food's Amended and Restated Shareholders Agreement dated April 4, 2005 ("2005 Agreement") relating to the transferability and/or sale of stock, 2) Defendants' motion for an Order, pursuant to CPLR § 3212, granting Defendants summary judgment dismissing the Verified Complaint ("Complaint") in its entirety, with prejudice, and 3) Plaintiffs' cross motion for summary judgment declaring that two particular provisions in the amendments ("Amendments") to the 2005 Agreement are void as against public policy, invalid, unenforceable, impose an unlawful restraint on the right to sell personal property and, therefore, illegal as a matter of law.

In the Prior Decision, the Court provided detail regarding, *inter alia*, 1) the terms of the 2005 Agreement and the Amendments, 2) the history and nature of the business operated by Celauro, 3) the relationship among the parties, 4) prior litigation among the parties, 5) the circumstances under which the Amendments were executed, and 5) the parties' positions with respect to the motions before the Court. The Court 1) granted Defendants' motion for summary judgment dismissing the Complaint; and 2) denied Plaintiffs' Order to Show Cause and cross motion for summary judgment based on the Court's conclusions that the contested provisions in the Amendments are lawful.

The Prior Decision was based on the Court's determination that the provisions at issue do not violate the common-law rule against unreasonable restraints. The Court reasoned that the provisions do not create an effective prohibition against transferability itself because they do not authorize another individual or entity to arbitrarily prevent a transfer of property, thereby amounting to annihilation of property.

B. The Parties' Positions

Plaintiffs move to reargue the Prior Decision based on their contention that the Court “by implication, created law contrary to the law of at least 47 other states, [which] is unsupported under New York Law” (Ps’ Memorandum of Law at p. 1).¹ Specifically, Plaintiffs contend that the Court overlooked Plaintiffs’ argument that stock transfer restrictions that alter or diminish a shareholder’s property rights in previously issued shares require the consent of the affected shareholders.

Plaintiffs submit that this is a matter of first impression in New York, that there is no statutory provision in New York addressing this issue, and that no court in this State has articulated such a rule. Plaintiffs contend, however, that “[o]utside New York, however, forty-five of the remaining forty-nine states have enacted specific legislation that, under the facts in this case, would negate the stock transfer restrictions” at issue here (Ps’ Memorandum of Law at p. 2). Plaintiffs provide a list of states with legislation that protects non-consenting shareholders from stock transfer restrictions and a description of the applicable statutes. Plaintiffs submit, further, that two of the four states that have not enacted such legislation have recognized such protection to shareholders through the common law.

Plaintiffs also affirm that under § 6.27(a) of the American Bar Association’s Revised Model Business Corporation Act (“Model Act”), a stock transfer restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction. Plaintiffs concede that New York has not adopted the Model Act, but submit that it is regarded as a “trusted authority” (Ps’ Memorandum of Law at p. 10) on issues not specifically addressed by statute.

Defendants oppose Plaintiffs’ motion to reargue, and submit that the Court should deny the motion on the grounds that 1) Plaintiffs have not identified any authority or precedent in New York that would require the reversal of the Prior Decision; 2) as Plaintiffs concede, they are asking the Court to reverse the New York case of *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534

¹ Plaintiffs also contest the Court’s conclusion that the limitations at issue do not constitute an effective prohibition against transferability, but note that this objection is not the basis of this motion for reargument and that they have also filed a Notice of Appeal. (Ps’ Memorandum of Law at p. 1 and n. 1).

(1957), cited and relied on by the Court in the Original Decision; 3) Plaintiffs are effectively asking the Court to legislate by adopting a rule of law not previously recognized in New York; 4) Plaintiffs have notably omitted from their motion papers an acknowledgment that Nathan and Gaetana, after extensive negotiations, signed the Agreement which “explicitly authorizes the holders of 75% of the voting shares of 4C to amend the Agreement - a fact that squarely refutes all of Plaintiffs’ arguments and undermines their entire motion” (Ds’ Memorandum of Law at p. 2); and 5) the third and fourth Amendments at issue do not deprive any shareholder of his right to sell shares of the Corporation at fair market value at any time.

RULING OF THE COURT

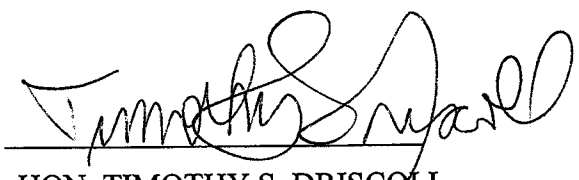
It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *Id.*; *Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992). *Accord Matter of Carter*, 916 N.Y.S.2d 821 (2d Dept. 2011).

The Court concludes that Plaintiffs have not demonstrated that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. Rather, it appears that Plaintiffs are asking the Court to, in effect, adopt a new rule that is consistent with legislation passed in other states — even though the Court has already concluded that such a rule is not compelled by the controlling New York State case law. The Court concludes that such a result would constitute improper interference with the province of the New York State Legislature. Accordingly, the Court denies Plaintiffs’ motion.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
April 6, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
APR 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE