

Matter of Celauro v 4C Foods Corp.

2013 NY Slip Op 31768(U)

August 2, 2013

Sup Ct, Kings County

Docket Number: 500373/2012

Judge: David I. Schmidt

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At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of May, 2013.

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

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IN THE MATTER OF THE APPLICATION OF

NATHAN J. CELAURO, INDIVIDUALLY; NATHAN J. CELAURO AS PRELIMINARY EXECUTOR OF THE ESTATE OF GAETANA CELAURO, THE DECEASED SOLE INCOME BENEFICIARY OF THE SALVATORE F. CELAURO REVOCABLE TRUST AND SALVATORE F. CELAURO IRREVOCABLE LIFE INSURANCE TRUST; NATHAN J. CELAURO AS VESTED BENEFICIAL OWNER OF THE SHARES OF 4C FOODS CORP. HELD BY THE SALVATORE F. CELAURO REVOCABLE TRUST AND SALVATORE F. CELAURO IRREVOCABLE LIFE INSURANCE TRUST; NATHAN J. CELAURO AS TRUSTEE AND LINDA CELAURO AS SUCCESSOR CO-TRUSTEE OF THE SALVATORE F. CELAURO CHILDREN'S TRUST F/B/O NATHAN CELAURO A/K/A THE NATHAN J. CELAURO IRREVOCABLE TRUST U/A DATED DECEMBER 26, 1991,

Petitioners,

- against -

Index No. 500373/12

4C FOODS CORP.,

Respondent,

For a Determination as to the Fair Value of Petitioners' Shares Under Article 4 of the Civil Practice Law and Rules and sections 623 and 806 of the New York Business Corporation Law.

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The following papers numbered 1 to 3 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-2
Opposing Affidavits (Affirmations)_____	3
Reply Affidavits (Affirmations)_____	_____
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, petitioners Nathan J. Celauro, individually, as preliminary executor of the estate of Gaetana Celauro and as the vested beneficial owner of shares of the respondent 4C Foods Corp. held by certain trusts, moves for an order: (1) pursuant to CPLR 2221 granting leave to renew respondent's motion to dismiss the Petition that was granted in this court's order dated December 5, 2012, and upon renewal, denying respondent's motion to dismiss the petition; and (2), pursuant to CPLR 3025, granting petitioners leave to file and serve an amended petition.

Petitioners' motion is denied with respect to petitioners' claims pursuant to Business Corporation Law §§ 623 and 806. With respect to the proposed causes of action premised on the breach of the implied covenant of good faith and fair dealing and breach of fiduciary duty, the motion to amend is denied, but with leave to file an amended pleading containing such causes of action upon the following events: (1) Nathan J. Celauro, as the executor of the estate of Gaetana Celauro, is barred from transferring voting shares to Nathan Celauro individually; (2) these voting shares are purchased by respondent, its directors and or its

majority shareholders; and (3) such causes of action are not otherwise rendered moot by any determination made in the Nassau County declaratory judgment action (*Celauro v Celauro*, Nassau County Index No. 426/13). The motion for leave to file an amended petition is granted with respect to the proposed declaratory judgment claim in which petitioner seeks a declaration that the January 11, 2013 notice addressing the transfer of voting shares formerly controlled by Gaetana Celauro is a nullity. The special proceeding is converted to a declaratory judgment action, but any further proceedings in the action are stayed pending the determination of the Nassau County declaratory judgment action (*Celauro v Celauro*, Nassau County Index No. 426/13).

In the dismissed petition, petitioners contended that, pursuant to Business Corporation Law §§ 623 and 806, they were entitled to a determination of the value of their shares in respondent and a judgment providing that respondent was required to pay petitioners fair value for their shares.¹ Petitioners are a minority group of shareholders of respondent, a closely held family corporation. The minority and majority groups of shareholders have had a contentious relationship for years. In 2007, the majority group passed an amendment to the shareholders agreement that gave the majority shareholders the right to approve or reject any transfer of shares (Fourth Amendment § 4.3 [a]) and that allows respondent to buy the shares for which transfer approval has not been granted (Fourth Amendment § 4.3 [b]). This amendment to the transfer provisions was declared legal and enforceable in a previous

¹ The facts are more fully detailed in this court's December 5, 2012 order that granted respondent's motion to dismiss (*Celauro v 4C Foods Corp.*, 38 Misc 3d 636 [Sup Ct, Kings County 2012]).

declaratory judgment action (*see Celauro v 4C Foods Corp.*, 30 Misc 3d 1204 [A], 2010 NY Slip Op 52264 [U] [Sup Ct Nassau County 2010], *aff'd* 88 AD3d 846 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]).

At issue in the instant proceeding was a December 2, 2011, resolution that amended the certificate of incorporation and the shareholder's agreement to provide for a four for one split of the non-voting shares for each shareholder. Although the amendment did not alter the percentage of shares held by the majority and majority shareholders, the split reduced the per share value of each share.² Petitioners contended that this amendment would thus allow the majority shareholders to take advantage of the limitation on transfer provisions (Fourth Amendment § 4.3) to pick off petitioners' voting shares at a reduced price. This issue was not merely hypothetical, in that Gaetana Celauro, who controlled a portion of the minority shares, was on her deathbed at the time the majority shareholders decided to amend the certificate of incorporation in order to change the number of shares. Further, upon her death in December 2011, and the subsequent probate of her will, the transfer of her shares or those held for her benefit from her estate to the beneficiary, petitioner Nathan Celauro, another

² Petitioners represent that, prior to the amendment, they held 3,220 voting shares out of 14,400 voting shares and 206,080 non-voting shares out of 921,600 non-voting shares, and that following the amendment, they hold 3,220 out of 14,400 voting shares and 1,030,400 out of 4,608,000 non-voting shares. Assuming, for example, that the petitioners share of respondent is worth \$30,000,000, the value of each share has been reduced from \$143.33 per share to \$29.02 a share. At least when respondent purchases shares for which it has rejected a transfer under section 4.3 of the fourth amendment to the shareholders agreement, the applicable appraisal process makes no distinction between voting and non-voting shares in determining the value of the shares (shareholders agreement § 8.2 [b] [v]).

minority shareholder, is a transfer that will be governed by section 4.3 of the fourth amendment.

Upon, respondent's declining to recognize the applicability of Business Corporation Law § 623, petitioners commenced the proceeding alleging entitlement to appraisal rights under section 623 and respondent moved to dismiss the petition. In support of the petition, and in opposition to respondent's motion to dismiss, petitioners had asserted that they were entitled to an appraisal pursuant to section 623 because the amendment adversely altered their redemption and voting rights under Business Corporation Law § 806 (b) (6) (B) and (D). In the December 5, 2012 order deciding respondent's motion to dismiss, the court stated that:

“Upon considering the language of the statute as interpreted by the extent court decisions, this court finds that the amendment here does not alter any of petitioners' rights under section 806 (b) (6). In this regard, the splitting of the stock does not affect any right to a preference for purposes of section 806 (b) (6) (A) since, prior to the amendment, all of respondents stock was common stock and none of its stock carried with it any preferential rights (*see generally* Business Corporation Law § 501 [generally describes the differences between common stock and preferential stock]). With respect to section 806 (b) (6) (B), respondent's limited right to repurchase shares under section 4.3 of the fourth amendment to the shareholders agreement upon a decision by a majority of the shareholders to reject all or part of a transfer is not a redemption right for purposes of the statute (*see Glens Falls Ins. Co. v National Bd. of Fire Underwriters Bldg. Corp.*, 63 Misc 2d 989, 991-994 [Sup Ct, New York County 1970], *affd* 36 AD2d 793 [1st Dept 1971], *lv denied* 29 NY2d 482 [1971]). Likewise, the splitting of shares also does not directly affect any preemptive rights or voting rights (Business Corporation Law § 806 [b] [6] [C], [D]).”

Because the court found that the amendment at issue here was not an adverse alteration of the certificate of incorporation for purposes of Business Corporation Law § 806 (b) (6), it also found that petitioners do not have a right to appraisal under Business Corporation Law § 623. This court noted, however, that:

“[R]espondent has not presented a business justification for increasing the number of shares, and, as such, petitioners’ concern that the majority shareholders may intend to take advantage of the reduced per share value of the corporation in order to pick off their voting shares may not be unreasonable. Nevertheless, the amendment at issue here is simply not one of the enumerated changes that would allow an appraisal action. It would appear that petitioners’ claim would be better addressed if and when the majority shareholders use section 4.3 of the fourth amendment to force a selective purchase by respondent of a portion of the shares to be transferred from Gaetana Celauro’s estate to Nathan Celauro in order to reduce the minority shareholders’ voting stake in respondent. At that time, petitioner may have an argument that any such limitation on the transfer by the majority shareholders would violate the fiduciary duty majority shareholders of a closely held corporation owe the minority shareholders (*see Liroso v Elkins*, 89 AD2d 903, 906-907 [2d Dept 1982]; *see also Schwartz v Marien*, 37 NY2d 487, 491-493 [1975]; *Giaino v EGA Assoc. Inc.*, 68 AD3d 523, 524 [1st Dept 2009]; *Lichtenberger v Long Is. Mach. Sales Corp.*, 71 AD2d 941, 947-948 [2d Dept 1979]).”

In moving to renew the motion to dismiss and to amend the petition, petitioners allege that the majority shareholders have now taken the action that the petitioners feared would be made possible by the amendments to the certificate of incorporation and shareholders agreement discussed above. Namely, Nathan Celauro, as executor of Gaetana Celauro’s estate, gave notice, pursuant to the stock transfer provisions (Fourth Amendment § 4.3), of

his intent to transfer the shares held by the estate to the beneficiary, Nathan Celauro. While, in their response, dated January 11, 2013, the majority shareholders allowed the transfer of the non-voting shares, they declined to allow the transfer all of the voting shares to Nathan Celauro unless the court, in a declaratory judgment action respondent has commenced in Nassau County, found that it was improper to disallow such a transfer. Petitioners contend that they are entitled to renewal and leave to amend the petition because this refusal to transfer the voting shares shows an actual violation of their rights under Business Corporation Law § 806.

Initially, the court need not decide whether renewal can be predicated on facts occurring after the submission of a motion (*see Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1627-1628 [4th Dept 2011]; *but see Johnson v Marquez*, 2 AD3d 786, 789 [2d Dept 2003] [movant improperly relied upon facts not in existence at the time of the original motion]; *Almonte v Western Beef, Inc.*, 21 AD3d 516, 516-517 [2d Dept 2005]; *Wilmington Trust Co. v Metropolitan Life Ins. Co.*, 2009 NY Slip Op 30258 [U] [Sup Ct, New York County 2009]). This is because the portion of the motion seeking leave to amend to add the additional facts would be deemed a timely motion to replead (*see CPLR 2001*), as the motion was made within 30 days of the service of the motion with notice of entry (*see Clark v Pfizer, Inc.*, 64 AD3d 536, 537 [2d Dept 2009]; *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 19 [2d Dept 2008]; *Imprimis Invs. v Insight Venture Mgt.*, 300 AD2d 109, 110-111 [1st Dept 2002]; 205 Siegel's Practice Review, 2D Department Holds

There's No time Limit on a Plaintiff's Motion for Leave to Replead within an Action, at 1 [January 2009]; *see also Republic Ins. Co. v Northern Aire Dev.*, 94 AD2d 764, 764 [2d Dept 1983] [facts arising subsequent to dismissal of complaint may render premature claim ripe for adjudication]).

The new facts here, however, do not alter the court's conclusion that the stock split amendment to the certificate of incorporation was not an adverse alteration for purposes of Business Corporation Law § 806 (b) (6). Namely, in reaching its conclusion, the court emphasized that the stock split amendment simply did not alter any of the stockholder rights that are deemed to constitute adverse actions against shareholders under section 806 (b) (6). In doing so, the court recognized that majority shareholders could use the amendment here to pick off voting shares at a reduced price, but found that such an alteration was more attenuated than those courts had found to constitute adverse amendments under section 806 (b) (6). That the majority shareholders are actually attempting to pick off the voting shares subject to the transfer from Gaetana Celauro's estate to Nathan Celauro does not alter the court's conclusions. A parties' rights under section 806 (b) (6) turn on a facial reading of the amendment to the certificate of incorporation, rather than subsequent actions taken in light of the amendment. Finally, the court's statement that the selective pick-off of voting shares might violate fiduciary duties owed by the majority was intended to suggest that petitioners might ultimately have a separate action based on a breach of fiduciary duties, not that the subsequent action would in some way render the amendment an adverse action for purposes

of section 806. The facts alleged in support the motion fail to show that petitioners have a cause of action pursuant to Business Corporation Law §§ 623 and 806 for the purposes of renewal and, without pleading a cause of action under those sections, the proposed amended claims under Business Corporation Law §§ 623 and 806 are palpably insufficient for purposes of the motion to amend/replead. (*see Clark*, 64 AD3d at 537). .

Relying on the same facts alleged with respect to the Business Corporation Law claims, petitioners also seek to amend the petition to add causes of action for breach of fiduciary duty against the majority shareholders (proposed third-claim for relief) and the board of directors (proposed fifth claim for relief), breach of the implied covenant of good-faith and fair dealing against the majority shareholders (proposed fourth claim for relief) and declaratory judgment declaring that the conditional nature of respondent's January 11, 2013 response to the stock transfer request renders it a nullity (proposed sixth claim for relief). Initially, with respect to these claims, the court notes that the actions of the majority shareholders may implicate the implied covenant of good faith and fair dealing (*see Suffolk Anaesthesiology Assoc., P.C. v Verdone*, 74 AD3d 953, 954 [2d Dept 2010]). Similarly, the majority shareholders and respondent's board of directors may owe petitioners a fiduciary duty in deciding whether to allow the transfer of the share's from Gaetano Celauro's estate to Nathan Celauro (*see Le Bel v Donovan*, 96 AD3d 415, 417 [1st Dept 2012]; *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 685 [2d Dept 2011]; *Blank v Blank*, 256 AD2d 688, 694-695 [3d Dept 1998]; *Lirosi*, 89 AD2d at 906-907; *see also Schwartz*, 37 NY2d at 491-493;

Giaino, 68 AD3d at 524; *Lichtenberger*, 71 AD2d at 947-948).

Nevertheless, at this time, petitioners' causes of action based on the breach of the covenant of good faith and fair dealing and the breach of fiduciary duty are premature, as petitioners still have not alleged grounds from which any cognizable damage may be inferred (see *Smith v Chase Manhattan Bank, USA, NA*, 293 AD2d 598, 600 [2d Dept 2002][damages necessary element of breach of contract]; *Ryan v Ready Mix Concrete*, 25 AD2d 530, 530 [2d Dept 1966] [contract claim insufficient absent allegations showing damages]; see also *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807-808 [2d Dept 2011] [damages are an element of breach of fiduciary duty claim]). While the majority shareholders and the directors of respondent indicate that they intend to bar the transfer of the voting shares and intend to purchase those voting shares pursuant to the transfer provisions of the shareholders agreement, they have conditioned this denial of transfer on the result of the declaratory judgment action in Nassau County. Until petitioners are actually deprived of the voting shares and forced to sell them to respondent, they have not been damaged (see *Palmetto Partners, L.P.*, 83 AD2d at 808; see also *Nenadovic v P.T. Tenants Corp.*, 94 AD3d 534, 535-536 [1st Dept 2012] [determination of contractual rights premature in absence of identifiable damages and in light of a related declaratory judgment action]).

Given that the breach of the implied covenant of good faith and fair dealing and breach of fiduciary duty causes of action are premature, petitioners' motion to amend is denied with respect to those claims on the current facts. On the other hand, in the event that,

following the resolution of the declaratory judgment action, the transfer is ultimately barred, the voting shares are purchased by the directors/majority shareholders and petitioners' assertions are not otherwise mooted by the declaratory judgment action, petitioners' causes of action may be cognizable at that time. As such, petitioners are thus granted leave to submit an amended pleading if these conditions have been met.


The claim seeking a declaration that the January 11, 2013 notice (i.e. respondent's notice declining to allow the transfer of the voting shares) is a nullity is not palpably insufficient or patently devoid of merit (*Maya's Black Cree, LLC v Angelo Balbo Realty Corp.*, 82 AD3d 1175, 1175-1176 [2d Dept 2011]). Petitioners are thus granted leave to amend. There are, however, no grounds supporting the claim as a special proceeding. Accordingly, the court exercises its authority to convert the proceeding to a declaratory judgment action (*see Tae Hwa Yoon v New York Han Wolee Church, Inc.*, 56 AD3d 752, 755 [2d Dept 2008]; *Jones v Town of Carroll*, 32 AD3d 1216, 1218 [4th Dept 2006]; *Allstate Ins Co. v Durand*, 286 AD2d 407, 408 [2d Dept 2001]), and petitioners are directed to file and serve the amended pleading in the form of a complaint rather than a petition.

The court notes, however, that the issues relating to the validity of the January 11, 2013 notice may necessarily be decided as part of the declaratory judgment action that has already been commenced in Nassau County. As such, and in order to avoid the waste of judicial resources and to avoid the possibility of inconsistent decisions, this court exercises its authority to stay this action until the resolution of the Nassau County declaratory judgment action (*see Halloran v Halloran*, 161 AD2d 562, 564 [2d Dept 1990]; *Sternberg v New York*

Water Serv. Corp., 94 AD2d 723, 723 [2d Dept 1983]). Petitioners thus should not file or serve any amended pleading until this stay is lifted by the court. In addition, while the court does not have the power to order a joint trial or consolidation of actions sua sponte, the parties may find it advisable to move for such relief given the overlapping factual and legal issues that are before this court and the Supreme Court in Nassau County (see *Lazich v Vittoria & Parker*, 196 AD2d 526, 530 [2d Dept 1993], *lv denied* 82 NY2d 656 [1993]; *Kobak v Schultz*, 117 AD2d 714, 716 [2d Dept 1986]; CPLR 602).

This constitutes the decision and order of the court.

E N T E R,


J. S. C.

HON. DAVID I. SCHMIDT

KINGS COUNTY CLERK
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