

Frankel v Harbes

2014 NY Slip Op 31880(U)

May 5, 2014

Supreme Court, Nassau County

Docket Number: 8411/13

Judge: F. Dana Winslow

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/JAS, PART 3
NASSAU COUNTY**

DAVID FRANKEL,

Plaintiff,

-against-

**MOTION SEQ. NO.: 001
MOTION DATE: 12/7/13**

PETER HARBES,

INDEX NO.: 8411/13

Defendant.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation.....2
Affidavit in Reply.....3

Motion by plaintiff for an order, pursuant to CPLR 3212(b), granting him partial summary judgment, is decided as set forth herein.

On July 12, 2013, a summons and verified complaint were filed by plaintiff, David Frankel, against defendant, Peter Harbes, asserting a cause of action for breach of a shareholders' agreement (Plaintiff's Ex. 5). The verified complaint alleges that on or about July 18, 2000, Frankel, Harbes and David Rose Perennials, Inc. ("DRP") entered into a shareholders' agreement (Plaintiff's Ex. 1), which was subsequently amended and extended several times (Plaintiff's Ex. 2). The shareholders' agreement, as amended and extended, contains a put/call option, which provides, in relevant part, that Frankel may demand that Harbes purchase all of Frankel's shares in DRP for a price set forth in the shareholders' agreement. The verified complaint further alleges that by letter dated May 15, 2013, Frankel exercised his option to demand that Harbes purchase all of his shares in DRP (Plaintiff's Ex. 3), but Harbes failed to purchase his shares.

On or about September 6, 2013, issue was joined by service of a verified answer, which admitted the existence of the shareholders' agreement (Plaintiff's Ex. 7). On or about September 26, 2013, Harbes served a verified amended

answer, which included the following three affirmative defenses: (1) that Frankel's claims are barred by the doctrines of estoppel and unclean hands; (2) that Frankel as an employee, officer and shareholder of DRP owed DRP and Harbes a fiduciary duty, which Frankel breached; and (3) that the agreements relied upon by Frankel are unenforceable because they were entered into under duress.

No discovery has been conducted yet in this matter. Frankel moves for partial summary judgment on liability and requests a hearing to determine the amount of his damages.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering evidence sufficient to demonstrate the absence of any material issues of fact. Failure to make such a showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). It is only once a prima facie showing has been made, that the burden then shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Frankel has demonstrated, prima facie, his entitlement to summary judgment on the issue of liability, by establishing the elements of a cause of action for breach of contract: the existence of the shareholders' agreement; Frankel's performance under the shareholders' agreement; Harbes' breach of the shareholders' agreement; and damages resulting from the breach (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]).

While Harbes admits the existence of the shareholders' agreement with Frankel, Harbes takes the position that the shareholders' agreement is unenforceable because it was entered into under duress. In opposition to Frankel's motion for summary judgment, Harbes offers his affidavit, in which he explains that he and Frankel were the officers and shareholders of DRP, a corporation formed in 2000 to take over and purchase the assets of Frankel's prior business (Harbes Aff. in Opp. ¶¶ 4 and 6). Harbes avers that Frankel made a \$500.00 capital contribution and lent an additional \$45,850.00 to DRP, while an additional \$500,000.00 in startup capital was borrowed, secured by Harbes' personal guarantee and mortgages on Harbes' properties. Harbes further avers that DRP's

current corporate debt, currently in excess of \$3,000,000.00, is secured with his personal holdings (Harbes Aff. in Opp. ¶ 7). Harbes claims that in 2008, DRP's business went flat and in 2009, business slumped dramatically. While Harbes loaned more and more money to DRP, he alleges that Frankel consistently refused to help (Harbes Aff. in Opp. ¶ 12). Harbes further asserts that beginning in 2008, Frankel extracted successive unfair and onerous agreements from him, including the contract of employment being sued upon in *Frankel v David Rose Perennials, Inc.*, Supreme Court, Nassau County, Index No. 8409/2013, knowing that if Harbes did not agree to Frankel's terms and demands, the alternative was financial ruin (Harbes Aff. in Opp. ¶ ¶13-14).

Harbes concedes that the shareholders' agreement he entered into with Frankel on July 18, 2000, as well as the amended shareholders' agreement entered into on February 16, 2001, contain a put/call option which gives each shareholder the right to purchase the shares of the other (Harbes Aff. in Opp. ¶ 10). However, Harbes argues that Frankel's action seeking to enforce the put/call option is premature since Frankel has not contacted the corporate accountant to establish the price for the shares, as required by Paragraph 11 of the amended shareholders' agreement.

In his affidavit, DRP's accountant contends that if he were asked to calculate the buy-out amount for Frankel's shares of DRP, it would be equal to the amount of Frankel's initial loan to DRP, together with accrued interest (Pubins Aff. ¶ 9).

In reply, Frankel argues that the put/call option contained in the shareholders' agreement is unconditional and he offers documentation demonstrating that Harbes had the assistance of counsel and accountants throughout the preparation of the shareholders' agreement and the amendments thereto (Plaintiff's Ex. 11). Moreover, Frankel points out that there is no language in the shareholders' agreement which requires DRP's accountant to determine the price of the shares prior to the exercise of the put/call option.

Harbes further takes the position that as an officer, shareholder and employee of DRP, Frankel had a fiduciary duty which he violated by attempting to convince customers of DRP to pay what they owed to DRP by doing work for Frankel (Harbes Aff. in Opp. ¶ 16). However, Harbes concedes that the customers in fact made the payments they owed to DRP (Harbes Aff. in Opp. ¶ 16). Frankel denies any attempt at diversion and claims that he only asked one of DRP's clients

(Frankel Aff. in Reply ¶ 22).

Harbes has failed to raise triable issues of fact sufficient to defeat Frankel's motion for summary judgment. Harbes concedes that the operative shareholders' agreement contains a put/call provision, and a plain reading of that provision makes it clear that there are no preconditions for the exercise of that option and no requirement that the corporate accountant determine the share price before the option may be exercised. Furthermore, Harbes' claims of duress are undermined by the documentary evidence which demonstrates that he had counsel review the shareholders' agreement and the amendments thereto beginning in 2001 and up until 2009 (Plaintiff's Ex. 11). Harbes' claims of breach of fiduciary duty by Frankel are likewise unsubstantiated.

Based upon the foregoing, it is

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

This constitutes the Order of the Court.

Dated:

May 5, 2014

[Signature]
J.S.C.

ENTERED
JUN 11 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE