

Kircher v Kircher

2014 NY Slip Op 32864(U)

October 31, 2014

Sup Ct, Suffolk County

Docket Number: 14-18396/2014

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/1/14
ADJ. DATES 10/27/14
Hearing Date: 10/1/14
Mot. Seq. # 001 - MG
Conference Scheduled: 12/12/14
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MICHELE A. KIRCHER, WAYNE KIRCHER,	:	O'ROURKE & HANSON, PLLC
JR. and MOBILERAD, INC.,	:	Attys. For Plaintiffs
	:	235 Brookside Dr.
	:	Hauppauge, NY 11788
	:	
-against-	:	JACOBY & JACOBY, ESQS.
	:	Attys. For Defendant
JAMIE KIRCHER,	:	1737 No. Ocean Ave.
	:	Medford, NY 11763
	:	
Defendant.	:	
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DECISION AND ORDER AFTER HEARING

Upon the following papers numbered 1 to 6 read on this motion for preliminary injunctive relief
; Notice of Motion/Order to Show Cause and supporting papers 1 - 2; Notice
of Cross Motion and supporting papers _____; Answering papers 3; Replying papers 4-5;
Other 6 (various exhibits); and after hearing counsel in support of and in opposition to the motion at a hearing held on
October 1, 2014, it is

ORDERED that this motion (#001) by the plaintiff for preliminary injunctive relief, among other things, is granted in its entirety; and it is further

ORDERED that after a hearing on the issue, the Court finds that plaintiff, Michele Kircher, owns 50 shares of corporate stock; plaintiff, Wayne Kircher, Jr., owns 20 shares of corporate stock; and defendant, Jamie Kircher, owns 50 shares of corporate stock; and it is further

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ORDERED that the defendant, Jamie Kircher, shall have until Thursday, **November 6, 2014**, at 11:00 a.m. to comply with the directions set forth in the Order to Show Cause, dated September 22, 2014; and it is further

ORDERED that all parties shall appear for a status conference on **December 12, 2014** in Part 45, at the courthouse located at 1 Court Street - Annex, Riverhead, New York *or* may call the court for an earlier date if the need arises.

By order to show cause dated September 22, 2014, the plaintiffs seek an order pursuant to Business Corporation Law § 720 enjoining defendant, Jamie Kircher, from, using the Corporate name "Mobilerad," the corporate bank accounts, telephone numbers, Medicare and Medicaid account numbers and the property of plaintiff, Mobilerad, Inc., including the portal x-ray and ultrasound machines and computers and various other requests for relief. As part of the order to show cause, the Court, after hearing from both counsel, granted certain affirmative relief, including the surrender of bank accounts, telephone numbers, corporate accounts, computer access codes, internet sites, check books and check registers of plaintiff, Mobilerad, Inc., and the return to plaintiffs of equipment, corporate records, x-ray, ultrasound, computers, and other items, within 72-hours of that date.

Importantly, the parties, on consent, agreed to an immediate hearing on the issue of stock ownership, which was incorporated into the order to show cause. That hearing was set for October 1, 2014. On that date, the Court heard from various parties and documents were offered into the record.

The Court was called upon to judge the credibility of the witnesses who testified and the Court's determination in assessing the evidence is entitled to deference (*see Northern Westchester Professional Park Assocs. v Town of Bedford*, 60 NY2d 492, 470 NYS2d 350 [1983]). A trial court's determination will not be disturbed unless its conclusions could not be reached under a fair interpretation of the evidence (*see BGW Dev. Corp. v Mount Kisco Lodge No. 1552*, 247 AD2d 565, 567, 669 NYS2d 56 [2d Dept 1998]). In this case, the resolution of various issues turned upon questions of credibility. The Second Department has repeatedly held that credibility is a matter within the trial court's special competence (*see Fisher v Fisher*, 87 AD2d 808, 448 NYS2d 781 [2d Dept 1982]; *Kurtish v Iskokovic*, 204 AD2d 847, 612 NYS2d 263 [2d Dept 1994]). What follows is a summary of the testimony that influenced the Court.

The position taken by the plaintiffs, in their motion papers, is that plaintiff, Michele Kircher, is the Vice President of the corporate plaintiff and owns fifty (50) shares of one hundred twenty (120) issued and outstanding shares. The plaintiff, Wayne Kircher, Jr., owns twenty (20) shares. The implication in the motion papers is that the defendant, Jamie Kircher, the former President then Vice President of the corporation, owns the remaining fifty (50) shares. This is a family owned business that was incorporated in 2001 by the defendant and operates a portable x-ray and ultrasound business to be performed at the homes of patients. The original business was established by the late husband and father, Wayne Kircher, Sr.

At the hearing, plaintiffs called the defendant as the first witness. At a prior shareholder meeting on June 18, 2014, defendant acknowledged, at that time, that the plaintiffs owned 70 shares and that he owned

50 shares (*see* Ex. C, to the order to show cause, transcript dated June 18, 2014). Defendant admitted the actions taken by the corporation to terminate him at the August 8, 2014 shareholder meeting and he was questioned as to where he procured the copy of the New York State Department of State incorporation papers and the copies of the 20 blank stock certificates, except for the copy of certificate Number 02, which purports to issue to defendant 130 shares on January 6, 2002 (*see* Pl. Ex. 1). Defendant offered confusing testimony as to obtaining the copies from one set of attorneys, yet he had no explanation as to why he never asserted, prior to the August 8, 2014 shareholder meeting, his newly asserted ownership interest in 130 shares. Defendant stated that he could not remember where it was but he had no explanation as to why he never stated that he owned more than fifty (50) shares prior to the August 8, 2014 meeting, except to say that it was there.

Plaintiff offered into evidence the original stock certificate Number 01 of fifty (50) shares issued on October 31, 2001 to plaintiff, Michele Kircher (*see* Pl. Ex. 2) and a photocopy thereof (*see* Pl. Ex. 3), to show the dark imprint of the corporate name on the copy. Next, plaintiff offered, from the actual corporate books, the original of certificate Number 02 (*see* Pl. Ex. 4), which is completely blank. A photocopy of same was offered to again show the dark imprint of the corporate name on the copy (*see* Pl. Ex. 5). It is plaintiffs' position at the hearing that the photocopies of their certificates (*see* Pl. Ex. 3 and 5) are identical, yet the purported certificate to defendant (*see* Pl. Ex. 1) is different.

Defendant could not offer an explanation as to why there were two separate certificates Number 02. He offered that he allocated the share to himself without the benefit of the corporate kit and that he simply took a copy of certificate Number 02 and added a corporate seal to it. He admitted that he did not fill out the certificate from the corporate kit and that he just used a blank copy to represent his shares. He admits he does not possess an original stock certificate.

Plaintiffs then offered the original certificate Number 00 (*see* Pl. Ex. 6), which was issued twenty (20) shares to plaintiff, Wayne Kircher, on February 1, 2003, while certificate Number 00 is blank in the exhibit defendant offered as proof of his ownership interest (*see* Pl. Ex. 1). The actual Stock Transfer Ledger (Share Register) was offered (*see* Pl. Ex. 7), which only reflects that plaintiff, Michele Kircher, received the fifty shares in certificate Number 01, from defendant, for \$10,000. Also offered as an exhibit was the original stock certificate stub for certificate Number 01 (*see* Pl. Ex. 8), which suggests that the fifty shares came from 100 shares transferred from the defendant. However, the defendant denies that he wrote the numbers "100" and "50" on the original stock certificate stub.

When questioned as to why he did not present his claim of superior ownership at the April 22, 2009 shareholder meeting, when he was removed as a Director (*see* Pl. Ex. 9), he stated that he brought it to the meeting in August 2014. Plaintiffs offered the original Consent of Shareholders to Sub S Election (*see* Pl. Ex. 10), dated December 15, 2001, which reflects that plaintiff, Michele Kircher, and defendant were 50% shareholders on that date. On that same date, the defendant signed a corporate Resolution (*see* Pl. Ex. 11), as the sole incorporator, which elected the deceased husband and father, Wayne Kircher, Sr. and plaintiff, Michele Kircher, as Directors with "50% shares." That incorporation resolution did not list defendant as a shareholder prior to the first annual meeting of shareholders.

Finally, plaintiffs offered Minutes of Special Meeting of Board of Directors of Mobilerad Inc. (*see* Pl. Ex. 12), which, on April 22, 2009, removed defendant as President and Treasurer and appointed him as Assistant Vice President. Defendant was present at the meeting and states that he never told the then attorney who prepared the documents that he owned 130 shares. He also admitted that he never asserted at the June 18, 2014 meeting that he owned 130 shares. Upon being confronted with his answers on page 15 of the transcript of that meeting, the defendant changed his testimony to state that where it stated “50 shares,” it was his handwriting. Moreover, he admits that he only voted 50 shares at the meeting in 2009.

The defendant’s wife, Jill Kircher, was called by plaintiffs and was taken out of turn due to child care. She offered little, aside from saying that the defendant never spoke about the amount of shares he owned and never said he was a majority owner. She acknowledged that he was demoted in 2009 but insisted that after the June 18, 2014 meeting, the defendant went to see the original law firm and thereafter remembered where he had placed the stock certificate that reflected the 130 shares.

On cross, by his own counsel, defendant admitted that he never had the original stock certificate and that the plaintiff retained the corporate kit at all times. He stated that he found the stock certificate in a folder in his house. No proof was ever offered by defendant as to the shares he claimed to own. On redirect, defendant claimed that he had one folder in his home with corporate documents and that he had previously looked at the folder, but recently looked again and saw the copy of the certificate that he produced. He admitted that he did not know that he should not have issued himself shares without a corporate resolution or the corporate book.

Plaintiff, Wayne Kircher Jr., testified that his mother and the defendant had equal shares and that he invested and was provided with 20 shares as a peacekeeper. He also stated that he was never told that the defendant found additional shares and in over 10,000 telephone calls, the defendant never mentioned that he was a majority shareholder.

Plaintiff, Michele Kircher, stated that she and the defendant were equal shareholders and that she never saw a certificate that gave the defendant 130 shares. Additionally, the defendant never told her in all the years of operation, that he was the majority shareholder. She also questioned the shadow box in the corporate name of the corporation set forth in Pl. Ex. 1.

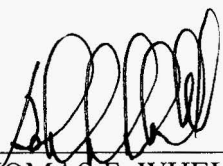
The Court rejects the defendant’s attempt to “create” a stock certificate from a copy of a copy of the certificate found in the corporate kit, which certificate is still “blank” in the corporate book. The exhibits (*see* Pl. Ex. 10 and 8) importantly reflect the original intent of equal ownership, with the subsequent issuance of 20 shares to plaintiff, Wayne Kircher, for his investment and peacemaker role (*see* Pl. Ex. 6). Moreover, the history of important corporate events reflects the 70/50 split in shares. The Court credits the testimony of plaintiff Wayne Kircher, Jr. and finds the testimony of the defendant to be contrived.

Based upon the totality of the evidence presented and the credibility of the parties, which is an important consideration in this case, the Court finds that plaintiff, Michele Kircher, owns 50 shares of corporate stock, Wayne Kircher, Jr., owns 20 shares and defendant Jamie Kircher owns 50 shares.

Additionally, the relief requested in the Order to Show Cause, under items (A) through (H) is granted in its entirety. Defendant was properly terminated and removed as an employee of the corporation at the shareholders meeting of August 8, 2011 and yet he continues to refuse to surrender and return various items of corporate property. Defendant shall have until Thursday, **November 6, 2014** at 11:00 am to comply with the directions set forth in the Order to Show Cause. Failure to do so will invite a contempt of court order from this Court, with all the necessary civil and criminal penalties. The Court is cognizant of the apparent disregard by the defendant of the affirmative relief set forth in the Order to Show Cause signed by this Court on September 22, 2014.

This constitutes the decision and order of the Court.

DATED: 10/31/14



THOMAS F. WHELAN, J.S.C.