

Berger v Friedman

2015 NY Slip Op 32189(U)

October 27, 2015

Supreme Court, Queens County

Docket Number: 702322 2015

Judge: Duane A. Hart

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This opinion is uncorrected and not selected for official publication.

I.G. Federal Electrical Supply Corporation is a wholesale distributor of electrical parts and equipment. In or about February, 1993, plaintiff Meryl Berger (Meryl), defendant Ira M. Friedman (Ira) , and defendant Jodi Ehren (Jodi), three siblings, each acquired one third of the stock in the company from their parents.

On or about February 23, 1993, the parties entered into a shareholders agreement. Paragraph 2 of the agreement provided in relevant part: "Corporation shall not, without the prior unanimous vote of all of the members of the Board of Directors: *** (k) Take other 'major actions' which for purposes of this Agreement, shall mean actions in those areas which do not involve the normal, routine day to day management of Corporation but, rather, involve those activities which may have a major impact on the corporation and economic stability." Paragraph 4 of the shareholders agreement required the shareholders to sell their stock back to I. G. Federal upon the occurrence of certain events. Paragraph 4(a) provided in relevant part: "Upon the occurrence of any of the following events, the affected Stockholder *** shall be deemed to have offered to sell and transfer the shares of stock in Corporation held by such Stockholder to Corporation *** (5) the termination of a Stockholder's full time employment by Corporation ***." However, paragraph 4(b) further provided that if either Meryl or Jodi ceased to be full time employees of the corporation, but their husbands, Jason Berger (Jason) and Todd Ehren (Todd) respectively, continued to work as full time as employees of the corporation, then the wife of the full time employee would not have to sell her shares back to I. G. Federal. Moreover, pursuant to paragraph 4(b), in effect, if either Meryl or Jodi were not full time employees at the time that their husbands ceased to be full time employees, then Meryl or Jodi had the option to return to full time employment, thereby avoiding the sale of their stock.

In or about February, 2012, Meryl, Ira, and Jodi learned that the Fraud and Rackets Bureau of the New York County District Attorney's Office had begun an investigation into fraud and corruption in the electrical contracting industry. Jason (Meryl's husband), who served as I.G. Federal's vice-president of sales, cooperated with the investigators and received no jail sentence. According to the plaintiff, Ira and Todd (Jodi's husband) chose not to cooperate and wound up pleading guilty to falsifying business records for which they received financial penalties and imprisonment. According to the plaintiff, when Ira was released from prison in or about May, 2014, he and Jodi were determined to punish Meryl for what they perceived as Jason's role in Ira and Todd's convictions. Among other things, Ira and Jodi attempted to place Jason on mandatory leave, began to harass Meryl, and tried to freeze her out of corporate affairs. In or about July, 2014, Ira and Jodi caused I.G. Federal to notify Jason, a senior officer and a twenty-five year employee with the company, that his employment would be terminated effective February 23, 2015. Ira and Jodi did not allow Meryl to participate in the decision to fire Jason.

On or about February 23, 2015, Ira sent Meryl a letter which stated in relevant part: “ As you are aware, Jason Berger’s employment with the Corporation has terminated. In addition, you have not been employed by the Corporation full time for the past 15 years. As such, pursuant to Article 4 of the [Shareholders] Agreement, you are deemed to have offered to sell the Corporation your shares of stock in the Corporation.”

In response to the letter, Meryl informed Ira that she wished to resume full time employment with I.G. Federal, which would have avoided the sale of her stock pursuant to paragraph 4(b) of the shareholders agreement. Ira replied that the company could not afford a full time salary for Meryl.

On March 13, 2015, an attorney for I.G. Federal sent Meryl a letter informing her that her stock in the company was worth only \$66,419.20 (Ira had allegedly valued Meryl’s shares at \$2,344,022 less than a year earlier). The attorney enclosed a check for \$6,419 and a promissory note for the balance. The letter went on to inform Meryl that since she had failed to deliver her stock to the company, it had cancelled the certificates representing her shares and had issued a new certificate representing the shares which the attorney held in escrow. The new certificate dated March 13, 2015 is in the name of Meryl RA. Berger.

This action, which seeks, inter alia, the common law dissolution of I.G. Federal (*see, In re Candlewood Holdings, Inc.*, 124 AD3d 775) ensued. The defendants submitted the instant motion which seeks an order pursuant to CPLR 3211(a)(1),(3), and (7) dismissing the complaint on the ground that Meryl lacks standing.

The motion is misguided. The court notes initially that the second cause of action seeks a declaratory judgment that, inter alia, Meryl has no obligation to sell her shares back to I.G. Federal, and since this is a cause of action which she asserts individually, not derivatively, standing is not an issue. Insofar as the derivative claims are concerned, it is true that a party must be a shareholder, or at least have an ownership interest in a corporation, in order to have standing to begin or continue a lawsuit asserting the claims of a shareholder. (*See, Indep. Investor Protective League v. Time, Inc.*, 50 NY2d 259; *Jedrzejcyk v. Gomez*, 116 AD3d 632 [individual had standing to petition for judicial dissolution of corporation even though the corporation had not issued shares, as petitioner established prima facie that he held a 50% interest in the corporation]; *Zentz v. Int’l Foreign Exch. Concepts, L.P.*, 106 AD3d 904; *Pursnani v. Stylish Move Sportswear, Inc.*, 92 AD3d 663.) In the case at bar, the defendants failed to demonstrate on this motion that Meryl is no longer a shareholder in I.G. Federal. First, the shareholders agreement can reasonably be construed to contain a promise that Meryl could resume full time employment with I.G. Federal if her husband’s full time employment ended, thereby avoiding the sale of her stock back to the company. A party is

excused from complying with his or her contractual obligations where the other party has committed a material breach. (*See, Grace v. Nappa*, 46 NY2d 560; 130-164; *Ravine Ave. Inc. v. Ravine Associates*, 139 AD2d 716; *In re Lavigne*, 114 F3d 379 .) If the defendants committed a material breach of the shareholders agreement by wrongfully refusing to permit Meryl to resume full time employment, then she had no obligation to sell her shares back to the company and the defendants had no right to cancel her shares. The defendants may also have committed a material breach of the shareholders agreement by firing Jason, arguably a “major action” requiring the unanimous consent of all shareholders. Second, “ a share is the property of the shareholder, not of the corporation ***Hence, the corporation has to reacquire the share to cancel it***.” (*Zyskind v. Facecake Mktg. Technologies, Inc.*, 110 AD3d 444, 446.) The defendants did not properly acquire Meryl’s shares before purporting to cancel them, since she never delivered her shares to them. (*See, UCC 8-104; Zyskind v. Facecake Mktg. Technologies, Inc., supra.*) Third, the defendants purportedly issued a new certificate in Meryl’s name which is being held in escrow by an attorney. The shareholders agreement recognizes that an individual who sells his or her stock back to the corporation remains a shareholder while his or her stock is in escrow until the note is fully paid. Paragraph 6(f) provides in relevant part: “So long as the Corporation is not in default in the payment of any of the installments *** Corporation shall have the right to vote the stock on deposit with the escrow agent and Seller shall, on demand, execute and deliver an effective proxy or proxies in favor of Corporation.” Under the shareholders agreement, the seller of stock in I.G. Federal remains the owner until the note is fully paid. Plaintiff Meryl has standing to maintain this action.

Dated: *October 27, 2015*

Duane G. Hart

 J.S.C.

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