Friedman v Markowits
2016 NY Slip Op 32804(U)
May 5, 2016
Supreme Court, Nassau County
Docket Number: 601153-15
Judge: Timothy S. Driscoll

ORIGINAL

SUPREME COURT-STATE OF NEW YORK
DECISION AND ORDER AFTER HEARING
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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BARRY FRIEDMAN, individually as a 90.1% membership interest holder and derivatively on behalf of PARKSHORE HOME HEALTHCARE, LLC, and RENAISSANCE HHA, LLC,

Plaintiff,

-against-

ALEXANDER MARKOWITS,

Defendant,

and

PARKSHORE HOME HEALTHCARE, LLC and RENAISSANCE HHA, LLC,

Nominal Defendant.

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TRIAL/IAS PART: 12
NASSAU COUNTY

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Motion Seq. # 1 and # 2

This Court held a hearing on the limited question whether plaintiff Barry Friedman maintains an ownership interest in defendants Parkshore Home Healthcare, LLC ("Parkshore") and Renaissance HHA, LLC ("Renaissance") (collectively, the "Company"), which interest would provide Friedman standing to maintain this action. The hearing followed oral argument on the motion by Markowits to dismiss Friedman's lawsuit. The Court now concludes that the evidence at the hearing sufficiently established that Friedman maintains an ownership interest in the Company to permit him to maintain the instant action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Friedman originally owned the entire membership interest in the Company. On March 16, 2010, Friedman and Markowits entered into a series of agreements providing Markowits with the right to acquire up to 100% of Friedman's membership interest. Exhs. 1 and 2. Markowits would originally acquire a 9.9% interest in the Company, and had the right to acquire the remaining 90.1 % interest if he complied with the various agreements.

The parties' relationship, and indeed the underlying transaction, was complicated from the outset because the Company was the subject of fraud investigations by the New York State Attorney General and the United States Attorney General. Exhs. M and N. Moreover, a third party, Aron Fried, had asserted a right to a 40% ownership interest in the Company. Friedman, as the owner of the company, knew about all of these disputes. Thus, as put succinctly and accurately by defendants in their pre-trial submission, the Company was a "hot potato" from the outset of the parties' relationship.

The transaction was structured in two phases to permit the New York State Department of Health ("DOH") to perform its own due diligence and provide necessary approval if DOH deemed it appropriate. DOH conducted an initial phase in conjunction with the 9.9% acquisition, which resulted in approval in October 2010. Markowits then paid $1.386 million in cash, which rendered him the owner of 9.9% of the Company.

A more rigorous DOH process was required before Markowits could close on the acquisition of the remaining 90.1% of the Company. Before that process could conclude, the parties amended their original agreement in June 2011 to provide Markowits with an option to acquire the remaining 90.1% with $4.614 million in cash and two promissory notes for $2 million and $5.35 million. Those sums total $11.964 million, and thus the total purchase price

for Friedman's entire interest in the Company was $13.35 million. The option itself would require an additional $100 as the call price.

Markowits signed a personal guaranty and confessions of judgment for the unpaid amounts reflected in the promissory notes. Then, shortly after the June 2011 amendment, Markowits satisfied the $2 million promissory note. The second promissory note for $5.35 million remained, and provided for monthly payments of $103,327.64 on the third day of each month for a period of 36 months. Exh. 6.

The parties further amended the terms of their agreements on February 29, 2012. On that day, they executed a Letter Agreement by which Markowits was to make a $2 million pre-payment on the $5.35 million note. The terms of that prepayment required Markowits to pay $1.5 million within five business days. He would then pay $500,000 in equal consecutive monthly installments beginning on March 15, 2012. Exhs. 13 and 122.

Markowits paid the first installment of $1.5 million. He then made various periodic payments, albeit later than the agreed upon dates. Specifically, he paid $150,000 on April 3, 2012 (which included $25,000 in unrelated debt), and then $125,000 on both May 4, 2012 and June 6, 2012. He then paid $65,000 on July 5, 2012. In response, on July 15, 2012, Friedman issued a notice of default and intent to accelerate the remaining amount unpaid on the $5.35 million note. Exhs. 15 and 122. Markowits believed that Friedman had authorized splitting the $125,000 monthly payment into two tranches, and attempted to pay an additional $60,000 on August 7, 2012. That payment was rejected by Friedman.

Given the voluminous correspondence and agreements between the parties, which markedly contrast with the lack of any contemporaneous correspondence and/or agreement supporting Markowits' claim that the parties agreed to split the last $125,000 payment into two

tranches, the Court rejects Markowits' testimony on this issue. Not including that last payment of $60,000, Markowits has paid $10,955,655.98 to Friedman towards the $13.35 million purchase price. Thus, well over $2 million remains unpaid.

Nevertheless, by mid-2012, Markowits took responsibility for the day-to-day operations of the Company The parties then awaited DOH approval. In August 2013, the DOH contingently approved the transfer of the Company to Markowits, and then in September 2013 asked for proof that the interest had in fact been transferred. See Exhs. 76, 83. No documentation existed, and indeed Friedman had already declared Markowits in default of the obligations that would permit the transfer in July 2012.

Friedman filed Markowits' confession of judgment relating to the $5.35 million promissory note that had not been fully paid. Markowits then sued Friedman in Supreme Court, Kings County, seeking to vacate the confession of judgment. That court vacated the confession of judgment, and the parties were eventually ordered to proceed to arbitration before a Beth Din. That order is still under review with the Appellate Division, Second Department.

Friedman's certainty that Markowits had not complied with the various provisions of the parties' agreements was somewhat refuted by his 2011 federal tax return. There, he reported on IRS Form 6252 ("Installment Sale Income") that he had sold his membership interests in June 2011 for $13.35 million, and that he had received over $8.4 million in "installment sale income." Then, in 2012, he reported receipt of an additional $1.9 million of the selling price.

Nevertheless, the Company's own accountants listed Friedman as the 90.1% owner of the Company for tax years 2011 and 2012. Exhs. AC, AE, AF, AW, and BL. In July 2014, Markowits instructed his accountant to list him as the 100% owner of the Company on its K-1 tax statements. In response, the accountant noted that there were "conflicting positions being

taken" by the parties regarding ownership in the company. Exhs. 97 and 122. Markowits then fired the accountant. The new accountant followed Markowits' instructions over Friedman's objections.

Markowits has dedicated significant time to managing the Company since 2012. Conversely, Friedman has not been involved in the Company's management in any way since mid-2012.

The central question in this case, of course, is whether Friedman remains an owner of the Company. The Court concludes that he is, because the credible evidence before the Court demonstrates that Markowits failed to comply with the terms of the parties' various agreements regarding the transfer of ownership from Friedman to Markowits. Those agreements, while voluminous and the result of a somewhat tortured history of negotiation and re-negotiation, are clear, and are to be interpreted in accordance with their plain meaning. *Lobacz v. Lobacz*, 72 A.D.3d 653, 654 (2d Dept. 2010). Pursuant to the parties' agremeents, Markowits was required to pay "in full" the full $5.35 million promissory note. He did not do so. The failure by Markowits to abide by the terms of the parties' agreements renders invalid his assertion that, pursuant to those agreements and his performance under those agreements, Friedman's interests were transferred to Markowits.

The Court is not persuaded by Markowits' attempt to rely on the assertion in Friedman's 2011 tax return that an installment sale of the Company closed on June 3, 2011 as the basis for a claim that Friedman is estopped from claiming he retains ownership in the Company. While it is well-settled that a party to litigation may not take a position contrary to a position taken in an income tax return, *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009), that principle has not been applied as broadly as Markowits would like. Indeed, the First Department

recognized that corporate and personal tax returns, even when filed with government agencies, are not in and of themselves determinative of corporate ownership. *Bhanji v. Baluch*, 99 A.D.3d 587, 587-88 (1st Dept. 2012). And the Third Department has similarly ruled that information contained in corporate filings such as tax returns is not necessarily dispositive as to ownership. *See Matter of Sunburst Associates, Inc.*, 106 A.D.3d 1224 (3d Dept. 2013). Those Appellate Division cases, coupled with the Company's assertion in his own tax returns that Friedman was the owner of 90.1% of the Company in 2011 and 2012 renders inapplicable Markowits' reliance on tax estoppel.

Nor does Markowits' purported current control of the Company, and his efforts on behalf of the Company, somehow confer on him full ownership of the company that would extinguish Friedman's ownership rights. Indeed, the Court has not found any binding authority, and the parties have not cited to any, that would require a conclusion that Markowits is the equitable owner of the entire Company.

Finally, Markowits' claim that Friedman somehow elected other remedies in the various venues in which the parties have litigated, and that these remedies foreclose his claim here, is unavailing. The evidence before the Court established that Friedman was not limited simply to recovering the amounts Markowits failed to pay (which resulted in Markowits filing the Kings County action currently on appeal in the Appellate Division, Second Department), but also had the right to assert control of the company as a Manager as part of the instant action.

All other matters in Motion Sequence #1 and #2 are hereby denied. This constitutes the Decision and Order of the Court. Counsel shall next appear before the Court on June 9, 2016.

ENTER

DATED: Mineola, NY
May 5, 2016

HON. TIMOTHY S. DRISCOLL

J.S.C.