Landa v Jones-Calnan
2016 NY Slip Op 32956(U)
September 30, 2016
Supreme Court, Nassau County
Docket Number: 602003-15
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 13
NASSAU COUNTY

BENJAMIN LANDA and BENT PHILIPSON,

Decision and Order

Plaintiffs,

MOTION SEQUENCE:01, 02

-against-

INDEX NO.:602003-15

JUDITH JONES-CALNAN,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

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The Plaintiffs move for an order, *inter alia*, pursuant to CPLR 3212 granting them summary judgment directing the Defendant to sell to the Plaintiffs certain stock in non-party Parkview Care and Rehabilitation Center, Inc.

The Defendant cross-moves for an order, *inter alia*: compelling arbitration of the Plaintiffs' claims; or alternatively, granting her summary judgment dismissing the complaint and awarding her judgment on her counterclaims; and pursuant to CPLR 602, joining the instant action with the related derivative action entitled *Judith-Jones Calnan, a Shareholder of Parkview Care and Rehabilitation Center, Inc., suing in the right of and for the benefit of Parkview Care and Rehabilitation Center, Inc., v Benjamin Landa, Bent Philipson, David Jones, Sr., Megan Jones and Parkview Care and Rehabilitation Center, Inc.* (Index No. 603706-15).

Background

By written stock purchase agreement dated December 2010 (the "SPA"), Defendant Judith Jones-Calnan and her brother, non-party David R. Jones, Sr. ("David Jones"), agreed to sell to the Plaintiffs, Benjamin Landa and Bent Philipson, 500 shares of stock in the Parkview Care and Rehabilitation Center, Inc. ("Parkview"), a 169-bed, residential health care facility located in Massapequa, New York. Pursuant to the SPA, and as subsequently amended, there were to be two closings. Fifty shares were to be conveyed at the first closing, with the remaining 450 shares to be transferred at the second closing, which was to be held within 30 days of the date upon which the New York State Department of Health ("DOH") approved the stock transfer (SPA at §§ 1.1, 2.2). Consideration for the sale was $942,000 together with the Plaintiffs' assumption and satisfaction of, *inter alia*, stated liabilities set forth in subsequently amended

versions of the SPA (SPA at §§ 1.2-1.2.1).[1] Prior to 2010, Defendant and David Jones were the sole owners of all 1000 outstanding shares of capital stock in Parkview (Complaint at ¶¶ 3-12).

On June 27, 2011, the first closing anticipated by the SPA took place at which time Defendant transferred 50 shares of Parkview to the Plaintiffs, leaving Defendant with 450 shares (45%) of the capital stock of Parkview. That same day, the Plaintiffs, Defendant, and David Jones (the Defendant's brother) entered into a Shareholders' Agreement which was thereafter amended on July 1, 2012. Pursuant to the Amended and Restated Shareholders' Agreement ("Amended Shareholders' Agreement"), the Plaintiffs became the sole officers and directors of Parkview.[2]

By letter dated February 19, 2013, the DOH approved the transaction for the transfer of Defendant's remaining 450 shares ("DOH Approval") (Ex. "C" to Motion), but, according to the Defendant, the Plaintiffs delayed the second closing for over a year allegedly, and in part, because of a then pending wage investigation being conducted by the U.S. Department of Labor. In August 2014, the Department of Labor concluded its investigation - which it began in October 2012 - with a finding that Parkview had violated certain provisions of the Fair Labor Standards Act from July 23, 2011 through November 17, 2012. The finding led to the imposition of civil penalties (Ex. "G" to Plaintiffs' Motion; Defendant's Affidavit at ¶¶ 35-38).

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[1] The SPA was amended three times prior to the first closing for the transfer of 50 shares, which took place on June 27, 2011.

[2] Also on that day, the Plaintiffs entered into an option agreement with David Jones whereby Plaintiffs were granted the exclusive right and option to purchase the remaining shares of Parkview stock from David Jones.

According to the Defendant, prior to the DOH approval and pursuant to the terms of the Amended Shareholders' Agreement, the Plaintiffs acquired operation and control over Parkview and allegedly mismanaged the facility and/or committed a series of wrongful acts which the Defendant claims constituted violations of the SPA (Defendant's Affidavit at ¶ 40). More particularly, and as memorialized in the Defendant's affirmative defenses and counterclaims, the Defendant claims: 1) that the Plaintiffs' mismanagement of Parkview led to, *inter alia*, the Department of Labor investigation and subsequent penalties; 2) that the Plaintiffs wrongfully rejected her requests for a distribution to defray certain tax liabilities attributable to income due her as a Parkview shareholder in 2013; 3) that the Plaintiffs failed to pay an alleged $318,000 unsecured claim by Shore Pharmaceutical Providers, Inc. ("Shore") arising out of a bankruptcy proceeding Parkview had previously commenced some years earlier; 4) that the Plaintiffs hired Megan Jones, David Jones' wife, at an annual salary of $300,000 to serve as Chief Executive Officer, although she has never performed any of the duties associated with that position; and 5) that the Plaintiffs wrongfully rejected her shareholder request to inspect Parkview's books and records (Answer at ¶¶ 15-28).

Although the parties subsequently attempted to schedule the second stock transfer closing, they were unable to do so.

On April 24, 2015, the Plaintiffs commenced the instant action seeking specific performance compelling the Defendant to sell her remaining 450 shares of Parkview stock predicated upon claims of breach of contract (the SPA) and breach of the covenant of good faith and fair dealing. Notably, section 12.8 of the SPA provides in part that "in the event . . . [of] a failure to close by the Sellers, the Purchasers shall be entitled to specific performance . . . ." (SPA

at § 12.8).

The Defendant answered the complaint with admissions, general denials, and interposed various affirmative defenses and two counterclaims. In her counterclaims, the Defendant asserts that the Plaintiffs breached the SPA, and undescribed agreements "made pursuant to it" by refusing to make shareholder income distributions for 2013 and/or a distribution in light of tax liabilities incurred by the Defendant and related to her income derived as a shareholder of Parkview (Answer at ¶¶ 30-36).

In September 2015, approximately six months after Plaintiffs commenced the instant action, Defendant instituted a related derivative action entitled *Judith-Jones Calnan, a Shareholder of Parkview Care and Rehabilitation Center, Inc., suing in the right of and for the benefit of Parkview Care and Rehabilitation Center, Inc., v Benjamin Landa, Bent Philipson, David Jones, Sr., Megan Jones and Parkview Care and Rehabilitation Center, Inc.* (Index No. 603706-15) ("related derivative action") and asserted five causes of action grounded upon waste of corporate funds and various breaches of fiduciary duty.

The Plaintiffs move for summary judgment asserting entitlement to specific performance on the contract.

Defendant opposes the Plaintiffs' motion and cross-moves to compel arbitration or, in the alternative, for summary judgment dismissing the complaint and for judgment on her two counterclaims based upon the Plaintiffs' alleged refusal to make shareholder distributions. In the event summary judgment is denied, Defendant requests an order joining the instant action with the related derivative action and, if not joinder, that the court stay proceedings in the instant action pending resolution of the claims made in the related derivative action.

For the reasons that follow, the Plaintiffs' motion is denied and the Defendant's cross motion is granted in part and denied in part.

The Court's Determination

Plaintiffs' Motion for Summary Judgment

In support of their motion for summary judgment, the Plaintiffs submit, *inter alia*, the affirmation of Plaintiff Bent Philipson,[3] the pleadings (which are not verified), the SPA, the Amended Shareholders' Agreement, the DOH Approval letter, and various correspondence and documentation from the U.S. Department of Labor.

In order to establish *prima facie* entitlement to judgment for specific performance, the Plaintiffs must demonstrate that: Plaintiffs substantially performed their contractual obligations and were willing and able to perform their remaining obligations, that Defendant was able to convey the shares, and that there was no adequate remedy at law (*see E & D Group, LLC v Vialet*, 134 AD3d 981 [2d Dept 2015]; *EMF General Constr. Corp. v Bisbee*, 6 AD3d 45 [1st Dept 2004]). Inasmuch as the Plaintiffs have failed to demonstrate that they substantially performed their obligations under the SPA and are "willing and able to perform their remaining obligations", the Plaintiffs' motion for summary judgment on their claim for specific performance is denied.[4]

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[3] Philipson submitted an affirmation in support of Plaintiffs' motion affirming "under penalties of perjury" because, for religious reasons, he "cannot submit a sworn affidavit to the Court" (Affirmation in Further Support).

[4] Notwithstanding the language of the SPA where the parties agreed that the remedy for breach of the SPA is specific performance, the court does not address whether the subject matter of the SPA - shares in a rehabilitation facility - is unique and does not have an established market value such that there

Defendant's Cross Motion

Arbitration

Turning first to the Defendant's theory that the Plaintiffs' claim is subject to arbitration, the Defendant relies upon section 12.3 of the SPA which provides, in part, that the:

> Parties agree that the Supreme Court of the State of New York, County of New York or Nassau County, shall have jurisdiction over and be the proper and exclusive venue for any litigation brought under or in connection with this Agreement. The foregoing notwithstanding, *any controversy or claim arising out of or relating to this Agreement, or breach thereof shall be settled by arbitration* . . . . (emphasis added).

Although there is a strong public policy favoring arbitration (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]), nevertheless, like contract rights generally, a right to arbitration may be modified, waived or abandoned (*Id.*; *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 371 [2005]; *Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272 [1985]). "Not every foray into the courthouse effects a waiver of the right to arbitrate", however. "[W]here claims are entirely separate, though arising from a common agreement, no waiver of arbitration may be implied from the fact that resort has been made to the courts on other claims" (*Sherrill v Grayco Bldrs.*, 64 NY2d at 272-273, *supra*; *Willer v Kleinman*, 114 AD3d 850, 851 [2d Dept 2014] [determination of what constitutes a waiver depends on the facts and circumstances of each particular case]). In general, a determination that a party has waived the right to arbitrate requires a finding that the party engaged in litigation to such an extent as to manifest "a preference 'clearly inconsistent with [that party's] later claim that the parties were obligated to

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is no adequate remedy at law (*see Van Wagner Advertising Corp. v S & M Enterprises*, 67 NY2d 186 [1986]).

settle their differences by arbitration'" (*Flynn v Labor Ready,* 6 AD3d 492 [2d Dept 2004] *quoting Sherrill v Grayco Bldrs.,* 64 NY2d at 272, *supra*; *Flores v Lower E. Side Serv. Ctr., Inc.,* 4 NY3d at 371, *supra*).

Here, after the Plaintiffs commenced the instant action, the Defendant answered and – without referring to the arbitration clause – interposed various affirmative defenses and two counterclaims alleging: that the Plaintiffs "are in breach of the SPA and documents, agreements and instruments made pursuant to it, in connection with it and made a part of it". In this regard, the Plaintiff has herself sought affirmative relief and damages in a judicial forum based on violations of the same agreement (the SPA) which she now contends is governed by an arbitration clause (*see Sherrill v Grayco Builders, Inc.*, 99 AD2d at 967, *supra*; *Rusch Factors v Fairview Mfg. Co.*, 34 AD2d 635, 636 [1st Dept 1970]). This conduct evinces a preference inconsistent with her current claim "that the parties were obligated to settle their differences by arbitration" (*Sherrill v Grayco Bldrs.,* 64 NY2d at 272, *supra*). Importantly, the "use of the judicial process to prosecute claims also encompassed by an arbitration agreement . . . results in a waiver of the right to arbitration" (*Tengtu Intl. Corp. v Pak Kwan Cheung,* 24 AD3d 170, 172 [1st Dept 2005]; *Matter of State of N.Y.—Unified Ct. Sys. v District Council 37,* 121 AD3d 497 [1st Dept 2014]; *Willer v Kleinman*, 114 AD3d at 85, *supra*; *Ryan v Kellogg Partners Inst. Servs.,* 58 AD3d at 481, *supra*; *Spataro v Hirschhorn,* 40 AD3d 1070, 1071 [2d Dept 2007]).

Accordingly, the branch of the Defendant's cross motion seeking to compel arbitration is denied.

Summary Judgment Dismissing the Complaint

The Defendant argues that the Plaintiffs' failure to pay the Shore bankruptcy claim resulted in a failure to satisfy a condition precedent to closing contained in sections 1.2, 5.2, 9.5, 10.2 and 10.4 of the SPA. Defendant's argument is unpersuasive.

In this regard, the court notes the following: Parkview has an outstanding bankruptcy claim by Shore Pharmaceutical which was confirmed by the Bankruptcy Court on June 8, 2011 in connection with Parkview's plan of reorganization; by letter dated August 13, 2014, Plaintiffs' counsel informed defense counsel that the second closing for the transfer of Defendant's remaining 450 shares of Parkview could not take place until *inter alia*, "payment in full of the bankruptcy claims" and that it "would not be appropriate to close" until the payments on the bankruptcy claims were made (Ex. "L" to Defendant's Reply); and that as of May 29, 2015 (which is one month after Plaintiffs filed their complaint), Parkview has not satisfied the Shore bankruptcy claim and is "in default" of the obligations to Shore under the reorganization plan (Ex. "J" to Cross Motion).[5]

Notwithstanding the outstanding Shore bankruptcy claim, coupled with Plaintiffs' acknowledgment that they would not close until "payment in full of the bankruptcy claim", the court cannot conclude, as a matter of law, given the parties' submissions, that payment of the Shore bankruptcy claim is a condition precedent to be satisfied by the Plaintiffs.[6]

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[5] The court also notes an e-mail exchange on September 16, 2013 (seven months *after* the DOH Approval) wherein Plaintiffs' counsel informed the Defendant that "timing" of the second closing "has not yet been determined" (Ex. "E" to Cross Motion).

[6] Pursuant to section 1.2 of the SPA, as consideration for their payment of shares, the Plaintiffs, as purchasers, were to assume and satisfy: a priority claim in bankruptcy filed by the Service Employees' International Union and Parkview liabilities owed to the Department of Health for the period April 1,

Accordingly, given the express language of the SPA, the court concludes that the Defendant has failed to *prima facie* establish that, at the time the complaint was filed, she was not obligated to sell or transfer her remaining 45% interest in Parkview to the Plaintiffs.[7]

Summary Judgment on Defendant's Counterclaims

The branch of Defendants' cross motion seeking summary judgment on her counterclaims is also denied.

The Defendant received a Schedule K-1 representing that her share of 2013 Ordinary Business Income relative to Parkview was $350,937. In her counterclaims, Defendant alleges that the Plaintiffs are in breach of the SPA, and other agreements and instruments made in connection with it (which would include the Amended Shareholders' Agreement) and, thus, Defendant is entitled to an order directing Plaintiffs to authorize and approve Parkview's distribution of: $350,937 to Defendant "as her share of Parkview's income for 2013" (first counterclaim); and an "amount equal to that which constitutes her state and federal tax liabilities for her share of Parkview's income as reflected in" the 2013 Schedule K-1 (second counterclaim) (Answer at ¶¶ 30-36).

2002 through December 31, 2008. Notably, the SPA does not contain language delineating the Plaintiffs to pay, assume, or otherwise satisfy the Shore bankruptcy claim, or any other bankruptcy claims.

[7] *MHR Capital Patners LP v Pressek, Inc.*, 12 NY3d 640 [2009] [a "condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises'. . . . Express conditions must be literally performed; substantial performance will not suffice"]; *compare Grin v 345 East 56th Street Owners, Inc.*, 112 AD2d 504 [2d Dept 1995] [cause of action for breach of contract and specific performance dismissed where plaintiff failed to comply with condition]).

Section 5.1 of the Amended Shareholders' Agreement provides as follows:

> Distributions and Dividends. The Shareholders agree that the Corporation shall not, without the unanimous written consent of the Corporation's Directors, make any distributions or dividends to any of the Shareholders between the date hereof and the sooner of the closing or termination of the Option Agreement *except to the extent, and only to the extent, of any tax liabilities of the Shareholders arising as a result of their ownership of the Corporation* . . . . (emphasis added).

The Defendant has failed to establish entitlement to judgment as matter of law on her counterclaims. Section 5.1 of the Amended Shareholders' Agreement does not require the Plaintiffs to make distributions. Rather, section 5.1 sets forth that distributions and/or dividends are to be made only upon unanimous written consent by the Directors (the Plaintiffs at bar).[8] In this regard, the court notes that "the issue of whether dividends should be paid by the corporations and the amount of those dividends is generally determined by corporate directors in their discretion, and a court is not justified in interfering absent evidence of bad faith, fraud, a clear abuse of discretion, or dishonesty on the part of the directors" (*Matter of Goerler*, 227 AD2d 479 [2d Dept 1996]).

Moreover, with respect to the second counterclaim wherein Defendant seeks an "amount equal to that which constitutes her state and federal tax liabilities for her share of Parkview's income as reflected in" the 2013 Schedule K-1, the court cannot determine, as a matter of law, that Defendant is entitled to a distribution to the extent of her tax liability. Although the language of section 5.1 contemplates the payment of distributions and dividends with regard to tax liabilities without the necessity of the unanimous written consent of the Directors, the court

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[8] A cause of action to compel the declaration of a dividend is of a derivative nature, belonging to the corporation (*see Matter of Goerler*, 227 AD2d 479 [2d Dept 1996]; *Bender v Ferro*, 86 AD2d 12 [1st Dept 1982]).

cannot determine, on this record, whether Defendant is *automatically* entitled to such distribution or dividiends.

"Where a valid contract is incomplete, extrinsic evidence is admissible to complete the writing if it is apparent from an inspection of the writing that all the particulars of the agreement are not present, and that evidence does not vary or contradict the writing" (*Matthius v Platinum Estates, Inc.*, 74 AD3d 908 [2d Dept 2010]; *Valente v Allen Shuman & Irwin Richt, D.P.M., P. C.*, 137 AD2d 678 [2d Dept 1988]; *see also Zaidi v New York Bldg. Contractors, Ltd.*, 99 AD3d 705 [2d Dept 2012]). However, courts may not add terms to a contract and thereby make a new contract for the parties under the guise of interpreting the writing (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978] ["courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"]; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks and citation omitted] ["courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing"]).

Given the language of section 5.1 of the Amended Shareholders' Agreement, coupled with the well settled principles of contractual interpretation, the court concludes that Defendant has failed to make a *prima facie* showing with respect to judgment on her second counterclaim for a distribution from Parkview of any amount equal to her tax liabilities for her share of Parkview's income as reflected in the Parkview 2013 K-1.

Joinder

A motion to consolidate actions or for a joint trial rests in the sound discretion of the trial court (*Nationwide Assocs., Inc. v Targee Street Internal Medical Group, P.C.*, 286 AD2d 717 [2d Dept 2001]; *Mattia v Food Emporium, Inc.*, 259 AD2d 527 [2d Dept 1999]). Where, as here, common questions of fact exist, a motion pursuant to CPLR 602(a) for a joint trial should be granted absent a showing of prejudice to a substantial right of the party opposing the motion.

Importantly, the Plaintiffs do not oppose joinder of the instant action with the related derivative action.

Conclusion

Based on the foregoing, it is hereby

Ordered that the Plaintiffs' motion is denied; and it is further

Ordered that the Defendant's cross motion is denied, except for the branch of the cross motion seeking joinder of the instant action with the related derivative action entitled *Judith-Jones Calnan, a Shareholder of Parkview Care and Rehabilitation Center, Inc., suing in the right of and for the benefit of Parkview Care and Rehabilitation Center, Inc., v Benjamin Landa, Bent Philipson, David Jones, Sr., Megan Jones and Parkview Care and Rehabilitation Center, Inc.* (Index No. 603706-15), which is granted; and it further

Ordered that the two actions (Index Nos. 602003-15 and 603706-15) are hereby joined for discovery and trial purposes; and its is further

Ordered that the caption of the joined actions shall likewise be amended and shall read as follows:

BENJAMIN LANDA and BENT PHILIPSON,

Plaintiff,

-against-

JUDITH JONES-CALNAN,

Defendant.

ACTION NO. 1
INDEX NO.: 602003-15

JUDITH JONES-CALNAN, a Shareholder of Parkview Care and Rehabilitation Center, Inc., Suing in the Right of, and for the Benefit of, Parkview Care and Rehabilitation Center, Inc.,

Plaintiff,

-against-

BENJAMIN LANDS, BENT PHILIPSON, DAVID JONES, SR., MEGAN JONES and PARKVIEW CARE AND REHABILITATION CENTER, INC.,

Defendants.

ACTION NO. 2
INDEX NO.: 603706-15

The attorneys for the parties are to appear in Part 11 on October 27, 2016, at 9:30 a.m. for a status and scheduling conference.

This constitutes the decision and order of the court.

Dated: September 30, 2016

Hon. Vito M. DeStefano, J.S.C.

ENTERED
OCT 12 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE