

**Adam v Bonfiglio**

2021 NY Slip Op 33151(U)

October 5, 2021

Supreme Court, Westchester County

Docket Number: Index No. 54905/2016

Judge: Terry Jane Ruderman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X

MARIANNE ADAM, Executor Under the Last Will and Testament of BRIAN C. FLOOD, and on behalf of LAKE MARION POINT, INC. derivatively,

Index No. 54905/2016

Motion Sequence No. 2

Plaintiff,

DECISION AND ORDER

-against-

DENISE BONFIGLIO and DENNIS BONFIGLIO as Co-Executors of the Estate of VIVIAN BONFIGLIO, DENNIS J. BONFIGLIO a/k/a DAVID J. BONFIGLIO,

Defendants.

-----X

RUDERMAN, J.

The following papers were considered in connection with the post-trial motion by defendants for reargument or alternative post-trial relief:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Memorandum of Law	1
Affirmation in Opposition	2
Reply Memorandum of Law	3

Following the trial of this matter on March 30, 2021, and the parties' submission of post-trial memoranda on May 19, 2021, this Court issued its trial decision and order dated June 8, 2021. It rejected plaintiff's claim that Brian Flood's contribution of 100% of the initial funding of Lake Marion Point, Inc. gave him, and consequently his Estate at the time of his death, a 100% ownership interest in the corporation's initially-issued shares. This Court also dismissed plaintiff's derivative claim seeking reimbursement to the corporation from the estate of

Vivian Bonfiglio for a \$65,000 payment made to Vivian Bonfiglio, and from Dennis Bonfiglio for \$9,600 he and Ravon Bonfiglio received from the corporation.

Based on the evidence submitted, this Court also concluded that it was unable to issue the declaration sought by defendants, that the Flood Estate's ownership interest in the Corporation had been validly diluted to 3.87% in 2015. Rather, the evidence established that Flood was a 34% shareholder in the corporation at the time of his death, and that Vivian Bonfiglio and Dennis Bonfiglio each owned 33%.

Defendants now move for an order pursuant to CPLR 2221 (d) (2), asking for either a determination that the 2015 Board resolutions reciting that addition shares of corporate stock were issued to Vivian Bonfiglio (Trial Exhibits L and M) were valid stock issuances, or in the alternative, confirming that the proceeds of the sale of the corporation, which funds are currently held in escrow, may be released to the Company for it to take further action distributing the funds to the parties.

This Court declines to revisit its decision that Exhibits L and M in themselves, without further testimony elaborating on or explaining the calculations underlying those Board resolutions, failed to present this Court with sufficient evidence to support a declaration that the Flood Estate's ownership interest in the corporation had been validly diluted to 3.87%. This decision was not based on whether plaintiff adequately countered that claim; it was based on defendants' failure to satisfy their affirmative burden of proof by providing the Court with a sufficient showing to justify the declaration they sought. Consequently, defendants failed to demonstrate that the ownership percentages that existed at the time of Flood's death were validly changed in 2015.

The alternative request by defendants that this Court “modify the Order in a minor manner to ensure that the Corporation can fulfill its legal obligations to all parties” by paying out the escrowed funds, is not as even-handed as the inoffensive language of defendants’ moving papers would indicate. This becomes clear in defendants’ reply papers, in which they reject plaintiff’s suggestion in her opposition papers, proposing that any court-approved distribution of the escrowed funds should reflect the only ownership percentages found by this Court – 34%, 33% and 33%. In their reply papers, defendants elaborate on their position that when the Corporation distributes the funds, if it is not permitted to calculate the payout to the Estate of Vivian Bonfiglio based on the increased percentage of ownership interest resulting from the purported 2015 share issuance, then it must repay her Estate for the amounts she contributed in 2015, which they argue must have been a loan, if it was not a capital distribution to the Corporation. In other words, by this alternative form of relief defendants continue to press the claim that this Court rejected in its trial decision, namely, that the Estate of Vivian Bonfiglio is entitled to claim ownership of all or almost all of the Corporation’s assets.

Notably, this Court’s trial decision concluded that defendants failed to demonstrate the validity of the additional purported stock issuance to Vivian Bonfiglio on which they relied. They also failed to establish that the funds she paid to the Corporation’s creditors constituted a capital contribution, or that in the alternative they necessarily constituted a loan to the Corporation. They certainly did not establish that the only two possibilities were that the payment was a loan or a capital contribution.

Because defendants failed to establish either that the ownership interest of the Flood Estate was reduced to 3.87%, or that the sums Vivian paid to creditors constituted a loan to the

Corporation, this Court rejects defendants' suggestion that in the distribution of the escrowed funds to the parties, Vivian Bonfiglio's Estate is entitled to payment in accordance with either of those theories.

In the interests of clarity and certainty, it will be assumed for these purposes that an order of this Court is necessary for the escrowed funds to be released for distribution by the Corporation. However, those funds should be distributed in accord with this Court's trial decision, which found no valid alteration in the 34%, 33%, 33% ownership interests of the parties, and which did not accept defendants' alternate proposal that Vivian Bonfiglio's direct payment to a creditor amounted to a loan of funds to the Corporation, such as would entitle her Estate to make a claim for repayment of that loan.

Accordingly, it is hereby

ORDERED that reargument is granted only to the extent of adding a provision regarding payout of the funds in escrow, and upon reargument the trial decision and order is modified so as to add a decretal provision reading that it is

ORDERED that the escrowed funds may be released to the Corporation to be paid out to the parties, with the proviso that such payments should be in accordance with their respective ownership interests in the Corporation as established before this Court, such that the Estate of Brian Flood is entitled to 34%, the Estate of Vivian Bonfiglio is entitled to 33%, and Dennis Bonfiglio is entitled to 33%.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
October 5, 2021

  
HON. TERRY JANE RUDERMAN, J.S.C.