

Harare Dev., Inc. v Zagami

2023 NY Slip Op 31300(U)

April 18, 2023

Supreme Court, Kings County

Docket Number: Index No. 512269/2022

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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HARARE DEVELOPMENT, INC.,

Plaintiff,

Decision and order

- against -

Index No. 512269/2022

RAYMOND ZAGAMI,

Defendant,

April 18, 2023

-----X
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The defendant has moved pursuant to CPLR 3212 seeking summary judgement dismissing the lawsuit. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint the plaintiff invested in the plaintiff corporation. The plaintiff seeks a declaration that the defendant is a 1.3% equity owner of the corporation and that when a distribution was made following the sale of property in 2019 a distribution of 13% was a clerical error. Thus, the distribution of \$358,548 should have been for \$35,854.80 and consequently the defendant owes the plaintiff \$322,693.20. The lawsuit seeks a declaratory determination the defendant is only a 1.3% owner and entitled to far less than he erroneously received. The defendant has now moved seeking summary judgement dismissing the lawsuit on the grounds there are no questions of fact he is a 13% shareholder of the plaintiff corporation and therefore the amount he received was accurate. As noted, the plaintiff opposes

the motion.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]). Thus, to succeed on a motion for summary judgment it is necessary for the movant to make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary judgment by pointing to gaps in the opponents case because the moving party must affirmatively present evidence demonstrating the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

On April 3, 1991 the defendant invested \$100,000 and was given share certificates representing a thirteen percent ownership interest in the plaintiff corporation (see, Letter dated April 3, 1991 [NYSCEF Doc. No. 16]). Further, Schedule K-1s for the years 2015 through 2020 all list the defendant as a

thirteen percent owner of the plaintiff corporation (see, NYSCEF Doc. No. 20). The defendant argues that while it is true that the defendant was originally a thirteen percent owner, he redeemed ninety percent of his investment in January 1997 and July and August 1998. Thus, he thereafter maintained an ownership interest of 1.3%. However, there is no evidence at all raising any questions of fact the receipt of \$90,000 constituted a redemption reducing the defendant's ownership share. Indeed, the initial investment was given along with a promissory note whereby the plaintiff promised to pay the defendant the sum of \$90,000. Thus, the payment to the defendant of \$90,000 was not a redemption of ownership shares but rather the repayment of a loan. Further, the repayment of that loan did not reduce the ownership interest of the defendant (see, Memorandum dated July 2, 1998 [NYSCEF Doc. No. 37]).

The defendant argues that a clerical error occurred whereby there was a failure to adjust the defendant's ownership interest from 13% to 1.3% following that payment amounting to \$90,000. However, there is no contemporaneous memorandum indicating the redemption of ownership on the part of the defendant. On the contrary, as noted, the plaintiff corporation indicated no such change in ownership occurred. Thus, without addressing any arguments of tax estoppel or the proper venue and applicable law that is relevant to this lawsuit there are no

questions of fact that have been presented which can defeat the evidence presented that the defendant remained a 13% owner of the plaintiff corporation.

The plaintiff insists that a clerical error was made wherein the tax returns and other documents, perhaps, reflect the inaccurate ownership interest of the defendant. While errors can surely occur, a bald allegation of such errors is insufficient to raise questions of fact where there is no evidence at all supporting the error. Thus, as noted, there is no statement or memorandum confirming the ownership change, there is no evidence of any updated K-1 Statements reflecting a different ownership percentage and there is no evidence raising any questions concerning the promissory note and the fact the plaintiff indicated the defendant's ownership interest would not change. Consequently, the mere assertion, at this juncture, that clerical errors were made is insufficient to raise any questions of fact. Therefore, the motion seeking summary judgement dismissing the lawsuit is granted. The motion seeking sanctions is denied.

So ordered.

ENTER:



DATED: April 18, 2023
Brooklyn NY

Hon. Leon Ruchelsman
JSC