

Stile v C-Air Customhouse Brokers-Forwards, Inc.

2023 NY Slip Op 34429(U)

December 15, 2023

Supreme Court, New York County

Docket Number: Index No. 656575/2020

Judge: Arthur F. Engoron

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART **37**

Justice

-----X

CLARE MARIE STILE,	INDEX NO. <u>656575/2020</u>
Plaintiff,	MOTION DATE <u>05/30/2023</u>
- v -	MOTION SEQ. NO. <u>005</u>

C-AIR CUSTOMHOUSE BROKERS-FORWARDS, INC., C-
AIR INTERNATIONAL, INC., MILTON HEID, AUGUSTUS
ANTICO,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents, and for the reasons stated hereinbelow, defendants' motion for summary judgment dismissing plaintiff's remaining causes of action is granted and defendants' motion for summary judgment granting their counterclaim is denied.

General Background

On May 21, 2010, Justice Richard B. Lowe III so-ordered a Stipulation of Settlement (the "Settlement") between Milton Heid and Augustus Antico (the "Individual Defendants"), as plaintiffs, and Salvatore Joseph Stile ("Decedent"), as defendant, by which the parties agreed to settle a number of disputes arising from their three-way evenly-split ownership of two companies, C-Air Customhouse Brokers-Forwards, Inc. ("C-Air NY") and C-Air International, Inc. ("C-Air LA," collectively, with C-Air NY, "C-Air"). NYSCEF Doc. No. 24.

The Settlement provided, inter alia, that defendants would give Decedent an income and other benefits until his death and, in exchange, Decedent would "forever forbear from commencing, prosecuting, and/or participating in, directly or indirectly, any action or proceeding against" defendants "concerning the issues of petty cash, credit card charges, loans to C-Air NY and C-Air LA, and any other matter related to the operation and/or business of" C-Air. NYSCEF Doc. No. 24 ¶ 7. Decedent, while maintaining his C-Air shareholder status, also agreed that he "shall not be entitled to any other payments, profits and has no interest in the operations" of C-Air. *Id.*

Pursuant to paragraph 10(d) of the Settlement, Decedent agreed that:

in the event that he sells, pledges, encumbers, transfers, or otherwise disposes of ... any interest in his shares of stock of [C-Air], then all payments and benefits due pursuant to this Order and Stipulation shall immediately cease ... In addition, no transfer shall be authorized unless and until the buyer, transferee, assignee or pledgee ... shall agree in writing to be bound by the terms and conditions of paragraphs 7, 10 and 13 hereof.

Id.

In addition, Paragraph 17 of the Settlement directs the parties to appoint an accountant, Ken Ayers ("Ayers"), within 30 days "to resolve and determine the amount of loans made by each shareholder" and states "[t]he parties hereto agree to be bound by [Ayers'] determination." Id.

On April 16, 2020, Decedent died.

Procedural Background

On November 25, 2020, plaintiff, Clare Marie Stile as personal representative of the estate of Decedent, sued defendants, asserting fifteen causes of action for: (1) shareholder distribution; (2) minority shareholder oppression; (3) common law dissolution against C-Air NY; (4) dissolution pursuant to BCL § 1104-a against C-Air NY; (5) fair value of shares against C-Air NY; (6) appointment of receiver pursuant to BCL § 1113; (7) conversion; (8) unjust enrichment; (9) accounting; (10) declaratory relief; (11) breach of fiduciary duty against C-Air LA; (12) breach of fiduciary duty against C-Air NY; (13) constructive trust; (14) breach of contract; and (15) money had and received. NYSCEF Doc. No. 1.

On January 29, 2021, defendants moved, pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7), to dismiss the complaint; and, on March 1, 2021, plaintiff moved, pursuant to CPLR 3025, to amend the caption. NYSCEF Doc. Nos. 6, 12.

In a Decision and Order dated September 13, 2021, Justice Verna L. Saunders granted plaintiff's cross-motion to amend the caption and denied defendants' motion to dismiss. NYSCEF Doc. No. 22. Defendants appealed. NYSCEF Doc. No. 27.

On October 5, 2021, defendants answered with general denials, 38 defenses, and a counterclaim for breach of the Settlement's Covenant Not to Sue. NYSCEF Doc. No. 23.

In a Decision and Order dated April 5, 2022, the Appellate Division, First Department, modified the September 13, 2021 Decision and Order and, finding that plaintiff was bound by the Settlement, granted defendants' motion to dismiss the first, third through ninth, and eleventh through thirteenth causes of action, and that part of the second cause of action based on defendants' refusal to permit plaintiff to inspect the books and records of C-Air. Stile v C-Air Customhouse Brokers-Forwards, Inc., 204 AD3d 429 (1st Dept 2022). Thus, four causes of action remain: (2) minority shareholder oppression, "to the extent the claim is based on defendants' refusal to recognize plaintiff as a shareholder"; (10) a declaratory judgment; (14) breach of contract; and (15) money had and received.

The First Department clarified that plaintiff, as “the personal representative of the estate of [Decedent], is bound” by the Settlement. Stile at 430. And, while Decedent “did not cease being a shareholder by virtue of the” Settlement, the First Department found it was “unclear” if the “transfer” contemplated in Paragraph 10(d) is “a transfer by operation of law, i.e. the transfer to [Decedent’s] estate when he died,” and noted that “if it is ultimately determined that this paragraph applies to transfers by operation of law, plaintiff should be given the opportunity to execute” a Transferee Agreement as contemplated in Paragraph 10(d). Stile at 432.

In a Decision and Order dated March 21, 2023, this Court granted defendants’ motion to quash a subpoena and denied plaintiff’s motion to compel. NYSCEF Doc. No. 101. In a Decision and Order dated May 12, 2023, this Court granted plaintiff’s motion to reargue the March 21, 2023 Decision and Order and, upon reargument, adhered to its prior determination. NYSCEF Doc. No. 114. As this Court noted in each instance: “the limited remaining issues in this case are: (1) whether plaintiff is a C-Air shareholder as a putative transferee of [Decedent’s] shares; and (2) the amount of any loan repayments that C-Air owes to plaintiff.” Id.

The Instant Motion

On May 30, 2023, defendants moved, pursuant to CPLR 3212, for summary judgment dismissing plaintiff’s remaining causes of action and granting defendants’ counterclaim. NYSCEF Doc. No. 116.

In support, defendants argue that the second and tenth causes of action, asserting minority shareholder oppression and seeking a declaratory judgment that plaintiff is a 1/3 shareholder of C-Air, should be dismissed as defendants are not, pursuant to Paragraph 10(d), required to authorize plaintiff’s transfer of shares until she has provided a written agreement to the terms of the Settlement, which she has not. NYSCEF Doc. No. 117.

Defendants allege that the clear language of the Settlement is sufficient to find that Decedent and the Individual Defendants intended also to bind Decedent’s transferees by operation of law. NYSCEF Doc. No. 117. They also offer extrinsic evidence, deposition excerpts of the Settlement’s drafters, that the parties did not intend Paragraph 10(d) to expire with Decedent. NYSCEF Doc. Nos. 139, 154.

Defendants also argue that: the fourteenth and fifteenth causes of action should be dismissed as the underlying loan amounts have been repaid; and the counterclaim should be granted as plaintiff’s initial complaint clearly breached the Covenant Not to Sue. NYSCEF Doc. No. 117.

In opposition, plaintiff argues that the First Department did not find defendants had utterly refuted plaintiff’s allegation that there was an actual and justiciable controversy vis-à-vis the parties’ rights to each other, especially as defendants have previously said they would not recognize plaintiff as a shareholder. NYSCEF Doc. No. 158. Plaintiff also argues, inter alia, that: defendants have failed to provide her with a Transferee Agreement to sign; the Settlement is ambiguous and so should be construed against defendants, who allegedly drafted it; any loan repayment does not resolve the fourteenth and fifteenth causes of action because “there was never a determination concerning the loan amount that was binding” on Decedent; and, plaintiff

never breached a Covenant Not to Sue as she is entitled to determine her rights under the Settlement as well as any loans due to Decedent. Id.

In reply, defendants argue, inter alia, that: it is plaintiff's obligation to deliver the Transferee Agreement if she wants to be a recognized shareholder and it is not defendants' duty to provide her one; there is no evidence to support construing the Settlement against defendants, as counsel for both sides worked closely on it; and, plaintiff cannot now argue she is not bound by Ayers' calculations of outstanding loans when she has adopted those same values and offers no evidence, beyond speculation, that additional amounts are owed. NYSCEF Doc. No. 159.

Discussion

In order to obtain summary judgment, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests' [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

Here, Decedent "did not cease being a shareholder by virtue of the settlement," and his shares in C-Air can therefore be transferred by operation of law to his estate. Stile at 432. However, those shares are still bound by the Settlement's requirement that "no transfer shall be authorized unless and until" a transferee agrees in writing to the Settlement's terms.

That Paragraph 10(d) was intended to continue past Decedent's passing is bolstered by both the Settlement's surrounding provisions, which, unlike 10(d), repeatedly and expressly contemplate Decedent's death, as well as by the depositions of Philip M. Halpern, who represented the Individual Defendants ("the combination of the words 'transfer or otherwise dispose of' leads me to believe that this is an all-encompassing, all-embracing provision irrespective of how the transfer or disposition occurs, by agreement or by operation of law or even by death."), and Evan Weintraub, who represented Decedent and, inter alia, had no recollection that Paragraph 10(d) was *not* meant to extend posthumously. NYSCEF Doc. Nos. 139 at 37:9-14, 154.

Therefore, plaintiff's second and tenth causes of action, asserting minority shareholder oppression and seeking a declaratory judgment that plaintiff is a 1/3 shareholder in C-Air, must be dismissed. Plaintiff cannot be recognized as a shareholder until she executes a writing binding her "by the terms and conditions of paragraphs 7, 10 and 13" of the Settlement. (As the First Department has noted, "plaintiff should be given the opportunity to execute such a writing." Stile at 432.)

Plaintiff's fourteenth and fifteenth causes of action seek repayment of certain loans made by Decedent to C-Air in the amount of approximately \$370,000. NYSCEF Doc. No. 1. Paragraph 17 of the Settlement instructed the parties to appoint Ayers within 30 days so that he could determine any outstanding shareholder loans to C-Air LA. NYSCEF Doc. No. 24. According to Ayers he was contacted within the proscribed time period. NYSCEF Doc. No. 163. Nothing in the Settlement supports plaintiff's implication that Ayers needed to "fully and finally resolve the

amount of the loan repayment due” during a specific time period or that Ayers’s eventual determination was not binding (the First Department’s discussion of the Settlement’s expired arbitration provision would only be relevant if there were evidence of “loans after the date of the release,” and there is none). Over the following years Ayers spoke to Decedent “many times” and was never given any indication his calculations were incorrect. NYSCEF Doc. No. 163. In a July 28, 2022 letter, Ayers calculated the remaining balance due to Decedent’s estate at \$359,634.40. NYSCEF Doc. No. 135. Between February 17, 2023, and April 4, 2023, defendants provided to plaintiff three checks totaling that exact amount. NYSCEF Doc. No. 138.

Therefore, as the loans in question have been repaid, plaintiff’s fourteenth and fifteenth causes of action must be dismissed. Plaintiff is bound by the Settlement, which required Decedent to accept Ayers’s loan calculations. Ayers was properly appointed pursuant to the Settlement, and plaintiff provides only unsubstantiated speculation that additional amounts might be due and owing.

As for defendants’ counterclaim: although plaintiff is bound by the Settlement, its existence did not preclude her from bringing the instant suit, it merely exposed her to potential damages. Colton v New York Hosp., 53 AD2d 588, 589 (1st Dept 1976) (a “covenant not to sue is not a release ... but merely an agreement not to enforce an existing cause of action ... Thus, the party possessing the right of action is not precluded thereby from thereafter bringing suit; however, he may be compelled to respond in damages for breach of the covenant.”). Here, however, the damages contemplated by the Settlement for breach are the cessation of Decedent’s “payments and benefits,” which already ceased upon Decedent’s death. Therefore, this Court must deny defendants’ counterclaim for breach of the Settlement’s Covenant Not to Sue, as there are no damages pursuant to the Settlement.

This Court has considered the parties’ other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Therefore, the motion of defendants, C-Air Customhouse Brokers-Forwards, Inc., C-Air International, Inc., Milton Heid and Augustus Antico, for summary judgment dismissing the complaint in its entirety is granted, defendants’ counterclaim is dismissed, and the Clerk is hereby directed to enter judgment accordingly.

DEC 15 2023 HON. ARTHUR F. ENGORON J.S.C.



12/15/2023
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLER ORDER	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT		