

PRESENT: **Hon. Marc S. Friedman**

PART 57

Justice

Index Number : 113575/2007

**GIAIMO, ROBERT T.**

vs  
**EGA ASSOCIATES**

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

s motion ~~is~~ for summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

1

Answering Affidavits - Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3-7

Cross-Motion:  Yes  No

*Memo of Law M1-M3*

Upon the foregoing papers, it is ordered that this motion *and cross-motions are*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**

OCT 30 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/28/08

*[Signature]*

**Hon. Marc S. Friedman**

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_  
ROBERT T. GIAIMO, individually and as Co-  
Executor of the Estate of Edward P. Giaimo, Jr.,

*Plaintiff(s),*

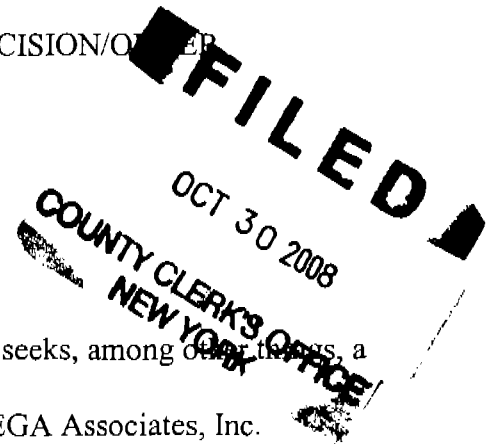
- against -

EGA ASSOCIATES, INC. and JANET GIAIMO  
VITALE,

*Defendant(s).*

Index No.: 113575/07

DECISION/ORDER



\_\_\_\_\_  
In this declaratory judgment action, plaintiff Robert Giaimo seeks, among other things, a declaration that the purported sale of a share of stock of defendant EGA Associates, Inc. ("EGA") by decedent Edward Giaimo to defendant Janet Giaimo Vitale is void. Plaintiff moves for summary judgment on his causes of action for declaratory relief and for injunctive relief cancelling the issuance of stock certificates resulting from the sale, and voiding a subsequent meeting of the board of directors. Defendants EGA and Vitale cross-move for leave to amend their answer to add an affirmative defense.

The following relevant facts are undisputed: EGA is a close corporation that was formed in 1961. As of November 27, 2005, Edward Giaimo was EGA's president and his brother, Robert Giaimo, and their sister, Janet Vitale, were board members. EGA's shares were divided equally among the three, with each holding 67.67 shares.

Edward Giaimo died on March 26, 2007. On March 13, 2007, Edward Giaimo purportedly sold one of his EGA shares to Janet Vitale for \$80,000.00. EGA's stock certificate

contained a sales restriction that gave EGA an option to purchase stock prior to its sale to a shareholder.<sup>1</sup> Ms. Vitale attests that Edward Giaimo told her that, in his capacity as EGA's president, he had waived EGA's right of first refusal prior to the sale. (See Vitale Aff. in Opp. ¶ 5.) She further contends that Edward Giaimo believed that Robert Giaimo would sell his shares in EGA, and that in order to ensure that EGA remained within the family, and to prevent shareholder gridlock, he decided to sell one of his EGA shares to her. (Id. ¶ 3.)

Decedent's will is in probate and Robert Giaimo and Janet Vitale are named as co-executors. The will provides for Edward Giaimo's EGA shares to be distributed equally to them. It is undisputed that before the contested sale, Janet Vitale and Robert Giaimo were equal shareholders in EGA, and that as a result of the purported sale, Janet Vitale became the majority shareholder. Robert Giaimo disputes the validity of the alleged waiver of the sales restriction by Edward Giaimo prior to his death.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853

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<sup>1</sup> The stock certificates issued to all shareholders provided that:

Shares are not transferable without granting the corporation thirty (30) days written notice of sale of terms, involved parties and a first option to purchase said shares before transfer to other existing shareholders or to third parties, except in the case of transfers to immediate family (spouse and children only). Such restrictions shall not apply. Corporate first option preserved for all subsequent transfers.

[1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

In moving for summary judgment, Robert Giaimo contends that Edward Giaimo’s discussions with Janet Vitale are the only evidence submitted by defendant in support of her contention that EGA waived its right of first refusal, and that this evidence is barred by the “Dead Person’s Statute.” (CPLR 4519.)<sup>2</sup> He thus argues that Ms. Vitale cannot, as a matter of law, prove the waiver.

Plaintiff’s contention is without merit. It is well settled that the Dead Person’s Statute precludes evidence “upon the trial of the action or the hearing upon the merits of a special proceeding.” (See Phillips v Joseph Kantor & Co., 31 NY2d 307, 313 [1972]. Accord Lopez v Town of Gates, 258 AD2d 961 [1<sup>st</sup> Dept 2000]; Salemo v Geller, 278 AD2d 104 [1<sup>st</sup> Dept 2000].) Thus, it has been held that “[u]pon a trial, the full policy of the Dead Man’s Statute will be given unstinting application. Before that time, under the letter of the statute evidence not otherwise infirm suffices to determine whether an issue of fact exists.” (Id. at 315.) Accordingly, on a

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<sup>2</sup> CPLR 4519 provides in pertinent part:

Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication. \* \* \*

motion where “there are better than fragments of evidence not inadmissible which may help to make out a case without the barred testimony,” application of the statute is inappropriate. (Id.)

Here, even assuming arguendo that CPLR 4519 would bar Ms. Vitale’s testimony as to Edward Giaimo’s statements waiving EGA’s right of first refusal, this testimony is not the only evidence submitted in opposition. Ms. Vitale submits not only the bill of sale for the stock from Edward Giaimo as seller to her as buyer, but also a new stock certificate, issued by the corporation, reflecting the sale of the shares. This evidence has been authenticated by a third party, Arlene Chanie Sheinwexler, Edward Giaimo’s personal assistant. (See Scheinwexler Aff. In Opp., Ex. F.) The Dead Person’s Statute “does not, by its terms, prohibit the introduction of documentary evidence against a decedent’s estate.” (Acevedo v Audubon Mgmt., Inc., 280 AD2d 91, 95 [1<sup>st</sup> Dept 2001].) Accordingly, the branch of plaintiff’s motion for summary judgment based on the Dead Person’s Statute should be denied.

Plaintiff further contends that Edward Giaimo’s alleged waiver of EGA’s right of first refusal is void under Business Corporation Law § 713 [“BCL 713”], as a transaction with an interested director. BCL 713(a) provides, in pertinent part, that, “[n]o contract or other transaction” between a corporation and one of its directors shall be either void or voidable “for this reason alone,” if the facts as to the director’s interest are disclosed and the board approves the contract or transaction by a sufficient vote without counting the vote of the interested director, or if the facts are disclosed and the shareholders approve the contract or transaction. (See BCL 713[a] [1], [2].) The statute further provides that if the contract or transaction is not approved in accordance with the above provision, “the corporation may avoid the contract or transaction unless the party or parties thereto shall establish affirmatively that the contract or

transaction was fair and reasonable as to the corporation at the time it was approved by the board, a committee, or the shareholders.” (BCL 713[b].)<sup>3</sup> In short, under BCL 713, a transaction with an interested director that is not approved as required by the statute, nor shown to be fair and reasonable to the corporation, is void. (See Sardanis v Sumitomo Corp., 282 AD2d 322, 324 [1<sup>st</sup> Dept 2001].)

On this record, plaintiff fails to eliminate triable issues of fact as to whether BCL 713 applies to Edward Giaimo’s alleged waiver or, even assuming arguendo that the section does apply, whether defendants violated its terms. It is undisputed that EGA’s board and/or its shareholders did not approve Edward Giaimo’s alleged waiver, in his capacity as EGA’s president, of the right of first refusal. However, it is well settled that “[t]he president or other general officer of a corporation has power, prima facie, to do any act which the directors could authorize or ratify. ... The true test of his authority to bind the corporation is whether, at the time, he is engaged in the discharge of the general duties of his office, and in the business of the corporation.” (Odell v 704 Broadway Condominium, 284 AD2d 52, 56-57 [1<sup>st</sup> Dept 2001] [internal quotation marks and citation omitted].) Here, plaintiff submits no authority to show that Edward Giaimo was acting outside of his authority in waiving EGA’s right of first refusal, or that EGA’s board was required to approve the alleged waiver.

Even assuming arguendo that the alleged waiver of EGA’s right of first refusal constitutes

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<sup>3</sup> BCL 713[b] provides that:

If a contract or other transaction between a corporation and one or more of its directors, or between a corporation and any other corporation, firm, association or other entity in which one or more of its directors are directors or officers, or have a substantial financial interest, is not approved in accordance with paragraph (a), the corporation may avoid the contract or transaction unless the party or parties thereto shall establish affirmatively that the contract or transaction was fair and reasonable as to the corporation at the time it was approved by the board, a committee or the shareholders.

a transaction by an interested director under BCL 713, plaintiff fails to eliminate triable issues of fact as to whether the disputed transaction was fair and reasonable to EGA. (See Anderson v Blabey, 52 AD3d 1234 [4<sup>th</sup> Dept 2008], lv denied \_\_\_ NY3d \_\_\_, 2008 NY Slip Op 07536; Ench v Breslin, 241 AD2d 475 [2d Dept 1997].) Ms. Vitale's affidavit makes a prima facie showing that Edward Giaimo's waiver of EGA's right of first refusal was made in order to effectuate the sale of one share to her and thereby to serve a bona fide purpose of preventing shareholder gridlock. (See Vitale Aff. in Opp. ¶ 3.) Moreover, Ralph Blitzer, EGA's accountant, attests that he advised Edward Giaimo that a sale of one share of EGA stock should be sold at "book value" with an estimated price of about \$60,000.00. (Blitzer Aff. in Opp. at ¶¶ 4-5.) Ms. Vitale purchased the share for \$80,000.00.

In opposition, plaintiff fails to submit any evidence to show that the waiver or the sale was unfair or unreasonable as to the corporation, rather than merely detrimental to his interests as an individual shareholder. Accordingly, the court finds triable issues of fact as to the validity of the sale. In light of this holding, the court also finds triable issues of fact as to validity of acts taken at shareholder meetings held by defendant Vitale subsequent to her purchase of the EGA stock from Edward Giaimo.

Defendants cross-move for leave to amend their answer to assert an affirmative defense alleging that the sales restriction in the stock certificate is void because it was never approved by EGA's shareholders. Defendants' cross-motion to amend should be granted. Plaintiff fails to submit any evidence or legal authority sufficient to demonstrate that the affirmative defense is clearly without merit. (See Katechis v Our Lady of Mercy Med. Ctr., 36 AD3d 514 [1<sup>st</sup> Dept 2007].) Plaintiff fails to show, or even to allege, that he has relied to his detriment on Ms. Vitale's prior representation that the EGA sales restrictions were valid. Plaintiff therefore does not establish a necessary element of his claim that Ms. Vitale is estopped from denying the

validity of the stock sales restriction. (See 57 NY Jur 2d Estoppel § 34.)

The court has considered the parties' remaining claims and finds them without merit.

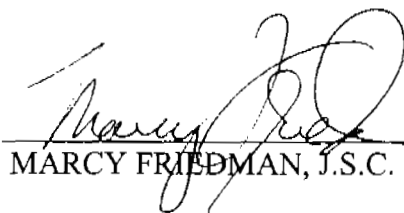
It is accordingly hereby ORDERED that the motion of plaintiff Robert Giaimo for summary judgment is denied; and it is further

ORDERED that the motion of defendants EGA and Janet Giaimo Vitale for leave to amend their answer is granted to the extent that defendants are granted leave to serve an amended answer in the proposed form annexed to the cross-moving papers (Ex. Q), together with a copy of this order with notice of entry, within 20 days of the date of entry of this order; and it is further

ORDERED that the proposed amended answer annexed to the cross-moving papers shall be deemed served upon service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 28, 2008

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
OCT 30 2008  
COUNTY CLERK'S OFFICE  
NEW YORK