

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ST. LAWRENCE

A. CAPPIONE, INC.; FRANCIS P. CAPPIONE; DAVID P. CAPPIONE; and JOHN R. CAPPIONE,

Index No. 140350

Plaintiffs,

**DECISION
&
ORDER**

- against -

MARC J. CAPPIONE and JOSEPH J. CAPPIONE,

IAS #44-1-2012-0889

Defendants.

Appearances: Hodgson Russ LLP (Ryan K. Cummings, Esq., and Melissa N. Subjeck, Esq., of counsel), attorneys for Plaintiffs; Menter, Rudin & Trivelpiece, P.C. (Juilian B. Modesti, Esq., and Teresa M. Bennett, Esq., of counsel), attorneys for Defendants.

DEMAREST, J.

This is a declaratory judgment action which seeks to determine and declare the rights of the parties under a Shareholders' Agreement dated November 17, 2005. A. Cappione, Inc., is a closely-held, family corporation engaged in the wholesale beverage business. Its primary asset is an exclusive distribution agreement with Anheuser-Busch, Inc., for the distribution of Budweiser beer and many other well-known brands. As a licensed wholesale beer distributor, it is licensed and subject to regulation by the New York State Liquor Authority.

Prior to May, 2005, the principals of the corporation were the Plaintiff Francis P. Cappione and the Defendant Joseph J. Cappione. The current owners of the outstanding shares are the Plaintiffs John R. Cappione and David P. Cappione, the sons of Francis P. Cappione; and, Defendant Marc J. Cappione, the son of Joseph P.

Cappione. Each of the current owners own one-third of the outstanding shares of stock. The "retiring shareholders" are treated as shareholders until promissory notes given to them for the purchase of their shares are paid off. Those notes have not yet been retired.

The Shareholders' Agreement begins with certain "Recitals" that describe the intentions of the parties. The pertinent recitals are:

"B. The shareholders desire to establish a market value for their shares, to effectively control the management of the company, for their mutual best interests, and to protect against divisive relationships which would arise if outsiders with incompatible management philosophies gained interests in the company."

"C. The company is dependent upon and derives substantial benefit from the continued active interest and participation of those shareholders who participate in the management of the company."

"D. The company and its shareholders desire to enter into this agreement knowing that it is in the best interests of the company and fair to each of the shareholders."

In December 2010, Defendant Marc J. Cappione was arrested and charged with a felony. He subsequently pleaded guilty to a Class E Felony and was sentenced to a term of incarceration with his earliest release date not until September 2014.

The New York State Liquor Authority prohibits a convicted felon from owning shares in a wholesale beer distributorship and has initiated proceedings against the corporation seeking to revoke its license. Without the license, the corporation will essentially be worthless.

Plaintiffs have attempted to implement the Shareholders' Agreement to buy Marc J. Cappione's shares to bring the company into compliance with State regulations. Those attempts have been rebuffed, citing a failure to strictly comply with the terms of the Agreement. Plaintiffs commenced this action to declare the rights of the parties and, more particularly, to establish that the corporation properly exercised its rights to buy back Marc J. Cappione's shares at a particular price as determined under the terms of the Agreement. Marc J. Cappione seeks a declaration that the Agreement has been breached and that he is no longer an employee of the company but retains his ownership interest.

Procedural Posture of the Case

The action was commenced by the filing of the Summons and Complaint on December 24, 2012. In lieu of an Answer the Defendants, by Notice of Motion dated February 6, 2013, moved to dismiss pursuant to CPLR §3211(a)(1). This motion was opposed with a Memorandum of Law, dated March 1, 2103. Thereafter, Defendants submitted another motion, dated April 1, 2013, pursuant to CPLR §3211(c), seeking pre-answer summary judgment, dismissing the Complaint and declaring that Marc J. Cappione shall retain his membership interest in the company.

By Notice of Cross-motion, the Plaintiffs seek summary judgment declaring the rights of the parties as prayed for in their Complaint. The matter has now been fully briefed, oral argument was heard on May 10, 2013, and both sides agree that the issues are ripe for judicial determination.¹

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Consideration has been given to the following submissions in rendering this Decision:

Findings of Fact

The facts in this case are largely undisputed. In addition to the "recitals" cited above, the relevant clauses to the Shareholders' Agreement are:

"SECTION ONE. RESTRICTIONS ON TRANSFER

A. General Restriction. A shareholder may not transfer any of his or her shares, whether now owned or later acquired, or any right or interest in them, without the prior written consent of the company and all of the shareholders, except by transfer which meets the requirements of this agreement.

* * *

SECTION TWO. LIFETIME DISPOSITIONS

A. Lifetime Transfers. If, during a shareholder's lifetime, a shareholder (the "seller") intends to sell, exchange, give away, or otherwise transfer any of his or her shares to anyone other than a family member, the seller shall first send a written notice to the company and the other shareholders specifying the number of shares to be

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1. Notice of Motion, dated February 6, 2013.
 2. Affidavit, with exhibits, of Julian B. Modesti, Esq., sworn to February 6, 2013.
 3. Defendants' Memorandum of Law, dated February 6, 2013.
 4. Plaintiffs' Memorandum of Law in Opposition, dated March 1, 2013.
 5. Notice of Motion, dated April 1, 2013.
 6. Affidavit, with exhibits, of Julian B. Modesti, Esq., sworn to April 1, 2013.
 7. Affidavit of Joseph J. Cappione, sworn to April 8, 2013.
 8. Memorandum of Law, dated April 1, 2013.
 9. Notice of Cross-motion, dated April 24, 2013.
 10. Affirmation, with exhibits, of Ryan K. Cummings, Esq., dated April 24, 2013.
 11. Affidavit, with exhibits, of David P. Cappione, sworn to April 23, 2013.
 12. Plaintiffs' Memorandum of Law, dated April 24, 2013.
 13. Reply affidavit, with exhibits, of Julian B. Modesti, Esq., sworn to May 8, 2013.
 14. Reply Memorandum of Law, dated May 8, 2013.

transferred (the "offered shares"), the proposed purchase price and payment terms, the identity of the transferee, and any other material terms of the transfer. For a period of thirty [30] days after the notice is delivered, the company shall have an option to purchase all or any part of the offered shares on the payment terms specified in Section Four and either at the price established in Section Four or, if the proposed transfer is for consideration of readily ascertainable value, at the price specified in the offer, whichever the company chooses.

* * *

D. Bankruptcy, Incompetency, Disability, etc. of a shareholder:

* * *

- In the case of a shareholder who is an employee of the company, ceases voluntarily or involuntarily to be an employee of the company for any reason then he or she shall be treated as though he or she were selling all of his or her shares under Paragraph A of this Section Two, and the company and the other shareholders shall have the options set out in paragraph A to purchase all or any part of the shares which the shareholder owns at the time that event occurs, except that the purchase price shall be determined under Section Four.

* * *

SECTION FOUR. PURCHASE PRICE AND PAYMENT TERMS

A. Purchase Price. The purchase price of each share to be purchased under this agreement at the price specified in Section Four shall be determined in accordance with the formula set out in Exhibit A.

B. Payment Terms. Any sale of the shares under this agreement shall be closed within Ninety [90] days after the event the event giving rise to the option or obligation to sell, at a time and place reasonably specified by the purchaser. At the closing the . . . purchaser shall pay the seller the purchase price in the manner provided in this paragraph.

1. The purchaser shall pay for the shares at the closing by delivering to the seller the purchaser's certified check for Ten percent (10%) of the total purchase price together with the purchaser's promissory note for the balance due.

2. The promissory note shall provide for 40 equal quarterly payments of principal and accrued interest, payable on the 1st day of each calendar quarter, beginning with the first day of the first full calendar quarter following closing as hereinabove defined. Interest shall accrue at the lowest applicable federal rate in effect at the date of closing.

* * *

Exhibit "A"

Determination of Purchase Price

The purchase price per share shall be determined periodically by an independent third party evaluator who shall determine the price per share of stock based upon the fair market value of the company as a going concern. The company contracted with Midtown Valuation Group, LLC of Fairport, New York for a determination of fair market value in 2004. Based upon the work performed by Midtown Valuation Group, LLC, the agreed upon value per share is currently established at \$1,472.79 per share of stock.

The company shall contract with an independent valuation firm every three years, but in no event more than five (5) years in accordance with this section. It is agreed that the determination by such independent valuers, when made, certified, and delivered, shall be binding on all parties to this agreement, provided that such independent valuers shall have used generally accepted accounting principles applied on a consistent basis."

On April 14, 2011, Marc J. Cappione executed a proxy statement designating his father, Co-Defendant Joseph J. Cappione, to act on his behalf for all matters related to the corporation. On June 15, 2011, a Special Meeting of the shareholders was scheduled for June 24, 2011. After receiving objections from then-counsel for the Defendants, a second notice of a Special Meeting of the shareholders was noticed for July 5, 2011. That notice was delivered to Joseph J. Cappione who attended the meeting at which a resolution was passed authorizing the purchase of all the outstanding shares owned by Marc J. Cappione "pursuant to the terms and conditions of the Shareholders' Agreement." The proxy and Joseph J. Cappione's attendance at the meetings satisfied any written notice provisions of the Agreement.

Immediately following the shareholders' meeting, a meeting of the Board of Directors was convened at which a resolution was passed terminating the employment of Marc J. Cappione, effective as of March 30, 2011. Minutes of the meeting were provided to Joseph J. Cappione who admits being at the meeting, but denies receiving formal written notice of the company's election to purchase Marc J. Cappione's shares.

Recognizing that the shares had not been valued since 2004, the company again hired Midtown Valuation Group, LLC, to determine a fair market value of its shares as of March 31, 2011. That valuation, not completed until May 10, 2012, determined that one share was worth \$27,340, making Marc J. Cappione's one-third interest worth \$911,324.22. The company has agreed to pay this amount upon terms consistent with the Shareholders' Agreement.

Several time limitations contained in the Shareholders' Agreement were not strictly complied with. Since Marc J. Cappione's termination was not officially accomplished until the shareholders' meeting on July 5, 2011, and made retroactive to March 30, 2011, the company was unable to formally exercise its option to purchase his shares within 30 days of the termination. Additionally, due to the delay in obtaining an up-to-date evaluation of the company's shares, it was unable to complete the purchase of the shares within 90 days.

Discussion

The Defendants contend that the failure to strictly comply with the time limitations contained in the Agreement render its attempts to purchase the shares a nullity and that Plaintiffs' complaint must be dismissed. At the heart of this argument is the claim that "time is of the essence" in this Agreement.

Although the Agreement does contain specific time limitations, it does not make "time of the essence" with those or similar words. Thus, where neither the parties nor their Shareholder Agreement made time of the essence regarding a closing date, the fact a closing was not consummated within 30 days as specified in the Agreement was not fatal. Sidor v. Cohen, 151 A.D. 2d 660 (2d Dep't 1989); see, Rutigliano v.

Rutigliano, 10 A.D. 3d 516 (1st Dep't 2004). "Determining what constitutes a reasonable time for performance requires factual analysis of the specific circumstances of the parties' relations, specifically including consideration of any potential prejudice or hardship accruing to either party." Gjonaj v. Sines, 69 A.D. 3d 1188, 1191 (3d Dep't 2010), *citing* Ben Zev v. Merman, 73 N.Y. 2d 781 (1988).

In this case, we are not dealing with parties who have decided to exercise an option to purchase an interest in a business in order to dissolve a partnership. The owner to be bought out here is not a dissident partner who wishes to voluntarily end a business relationship. Marc J. Cappione has no choice under the terms of the Agreement whether to sell his shares. By no longer being employed and being incapable by law of owning an interest in a beer distributorship, he is compelled to sell his shares.

By engaging in criminal behavior, Marc J. Cappione triggered the specific circumstances of the parties' relations, placed the company in jeopardy of losing its license to do business, and caused unforeseen potential hardship to the company in forcing a buy-out. To deny the Plaintiffs' request for relief would destroy the stated purposes of the Agreement:

"... to establish a market value for their shares, to effectively control the management of the company, for their mutual best interests, and to protect against divisive relationships which would arise if outsiders with incompatible management philosophies gained interests in the company."

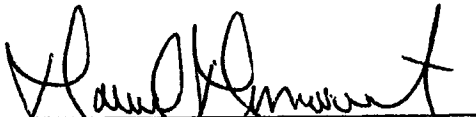
Under the particular circumstances of this case, it cannot be said that the failure to strictly adhere to the time constraints of the Agreement in any way prejudices any party. The declaratory relief requested by the Plaintiffs in their Complaint is

granted. This is, however, without prejudice to the Defendants' rights to dispute the valuation of the shares by establishing that the valutors did not use "generally accepted accounting principles on a consistent basis" as provided in Exhibit "A" of the Agreement.

Counsel are to settle judgment.

SO ORDERED

DATED: May 24, 2013, at Chambers, Canton, New York.


DAVID DEMAREST, J.S.C.

ENTER:

{Decision & Order, and moving papers filed}

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