

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

REINA V. CARRILLOS,

INDEX No. 023142/10

Plaintiff,

MOTION DATE: Aug. 10, 2015
Motion Sequence # 005, 006

-against-

SUYAPA GOMEZ and ARLINGTON
BODDEN CORP.,

Defendants.

The following papers read on this motion:

Notice of Motion..... XX
Affirmation in Support..... XX
Affirmation in Opposition..... XX
Affirmation in Further Support..... X
Reply Affirmation..... X
Rule 19-a Statement..... X

Motion by plaintiff Reina Carrillos for summary judgment is **granted** to the extent indicated below. Motion by defendants Suyapa Gomez and Arlington Bodden Corp. for summary judgment is **denied**.

This is an action for a declaratory judgment as to plaintiff's interest in a close corporation. From 1997 to 2008, plaintiff Reina Carrillos' husband, Orlando Carrillos, and Oscar Montiel operated a bar and restaurant at 387 Fulton Avenue in Hempstead. Carrillos

and Montiel were each shareholders in a corporation, La Esquina Corporation, which leased the premises from the Hempstead Development Corp. In 2005, Reina Carrillos obtained a \$200,000 equity loan on her home, which she advanced to her husband and Montiel to use as working capital for the business. On February 15, 2007, Reina Carrillos became a 15 % shareholder in La Esquina and Orlando Carrillos and Montiel each became 42.5 % shareholders. In 2008, Montiel bought out Reina and Orlando Carrillos, paying them each \$7,500 for their stock, and assuming the \$141,921 balance on the equity loan. During this time, Carrillos was represented by an attorney, Lawrence Goldstein. Montiel died in 2010, and the rent was several months in arrears at that time.

In early 2010, defendant Suyapa Gomez retained Lawrence Goldstein in connection with her interest in purchasing another bar and restaurant at 628 Fulton Avenue in Hempstead. However, Gomez was unable to negotiate a lease for that premises. In June of 2010, Reina Carrillos and Suyapa Gomez agreed to form a "business relationship" to operate a bar and restaurant at 387 Fulton Avenue. It appears that Carrillos and Gomez were brought together by Goldstein. In any event, Goldstein then began to represent both Carrillos and Gomez in connection with the venture.

Gomez had previously formed a corporation, defendant Arlington Bodden Corp. on February 3, 2010. According to Goldstein, Carrillos and Gomez agreed that they would each own 50 % of the stock of Arlington Bodden, and that it would lease the premises (Plaintiff's ex 57). On July 1, 2010, Arlington Bodden leased the premises for a term of ten years and one month from the landlord, ADM Properties, LLC. On July 1, 2010, Gomez issued a check to ADM Properties in the amount of \$2,500. On July 12, 2010, Reina Carrillos issued a check to ADM Properties in the amount of \$20,000.

On July 7, 2010, Carrillos filed an application for a liquor license purporting to be a 50 % shareholder of Arlington Bodden, and stating that Gomez was the other 50 % shareholder. On July 9, 2010, Carrillos filed a sub-chapter S election on behalf of Arlington Bodden with the New York State Department of Taxation and Finance, stating that she and Gomez were each 50 % shareholders. However, Gomez asserts that these documents were prepared by Lawrence Goldstein without Gomez' knowledge and, because Goldstein was subject to a conflict of interest, in violation of his professional obligation.

According to Goldstein, because Carrillos was unable to contribute as much capital as originally planned, it was agreed that Gomez would own 60 % of the stock and Carrillos would be only a 40 % shareholder (Plaintiff's ex 57). According to a shareholder agreement prepared by Goldstein and dated November 1, 2010, Carrillos and Gomez were each to be

20 % shareholders, and the rest of the stock was to be held by three other individuals, non-parties, Carlos Flores, Wendy Almendarez, and Simon Lainez. Carlos Flores is Gomez' friend, and Almendarez is Gomez' daughter. Lainez is a friend of Carrillos. However, the November 1, 2010 shareholder agreement was never signed.

The bar opened for business in November 2010 under the name of Gusto Latino Bar & Restaurant. However, a dispute soon arose between the parties. On November 12, 2010, Gomez sent Goldstein an email stating that she did not want to "continue partnership" with Carrillos and that she had "given her the option to buy or sell" (Plaintiff's ex 54). Gomez further stated that Carrillos did not want to do either and that Gomez had elected to buy Carrillos' share (Id). On November 28, 2010, Gomez tendered a check to Carrillos in the amount of \$25,890.21, purportedly representing Carrillos' investment in Arlington Bodden (Defendants' rule 19-a statement 27). Nevertheless, in her affidavit dated March 29, 2011 Gomez appears to recognize that Carrillos' interest can be "characterized as a minority 20 % or 40 % ownership interest" in the corporation (Plaintiff's ex 62 at ¶ 23). On December 3, 2010 Gomez excluded Carrillos from the premises.

This action was commenced on December 17, 2010. Plaintiff seeks a declaratory judgment that she is a 50 % shareholder of Arlington Bodden and an accounting with respect to the affairs of the corporation. The court notes that plaintiff does not seek dissolution of the corporation.

On March 4, 2013, plaintiff filed a note of issue. The parties are moving for summary judgment. Plaintiff seeks a declaratory judgment that she is a 50 % shareholder in Arlington Bodden. Defendants seeks a judgment declaring that plaintiff has no interest in the corporation.

Gomez claims that Goldstein and Carrillos defrauded her by falsely claiming that Carrillos owned the building where the bar is located and misrepresented the amount of capital that Carrillos had available to contribute to the venture. However, the court determines that Gomez ratified the agreement to sell Carrillos a 40 % interest in Arlington Bodden by consenting to Goldstein's preparation of the shareholder agreement with full knowledge of the terms of the transaction.

Carrillos' statements as to 50 % stock ownership in documents filed with the liquor and taxing authorities are self-serving. However, Goldstein's statements to his malpractice insurer, though hearsay, are declarations against interest to the extent that he admits a conflict of interest, and are otherwise sufficiently trustworthy to be admissible (Plaintiff's ex 57).

(See *Nucci v Proper*, 95 NY2d 597, 602-03 [2001]). Goldstein's letter to his malpractice insurer establishes prima facie that Carrillos was to be a 40 % shareholder in Arlington Bodden. The court notes that Carrillos contributed over \$25,000 cash to the venture and also provided valuable consideration by lending her name to the liquor license application. That Carrillos considered placing half her stock in the name of Lainez as nominee does not rebut her prima facie showing.

Accordingly, plaintiff Reina Carrillos' motion for summary judgment is **granted** only to the extent that the court issues a declaratory judgment that plaintiff is the owner of 40 % of the stock of Arlington Bodden Corp. The court further determines that defendant Gomez' email of November 12, 2010 operated as an irrevocable election to purchase plaintiff's shares at fair value (See Business Corporation Law § 1118[a]). Finally, the court determines that the valuation date shall be the day prior to the date the complaint was filed, i.e. December 16, 2010 (Business Corporation Law § 1118[b]). A valuation hearing shall be held on a date to be scheduled by the court. Because the parties ceased operating together so soon after their association was formed, there is no need for an accounting as to the affairs of Arlington Bodden or any adjustment in the value of plaintiff's shares.

So ordered.

Dated AUG 28 2015


J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE