

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ORIGINAL

E

RE/MAX OF NEW YORK, INC.,

Plaintiff,

against-

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 600848/2016

MOTION DATE: 11/1/16
Motion Sequence 002

HENRY WEBER,

Defendant.

HENRY WEBER,

Third-Party Plaintiff,

-against-

PIERRE TITLEY and GINETTE LAMBERT,
husband and wife, jointly and severally; and CAN AM
HOLDINGS, INC., as a shareholder of RE/MAX of
New York Inc.,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion.....X
Affirmation in Support.....X
Memorandum of Law.....X
Affirmation in Opposition.....X
Reply Affirmation.....X
Sur-Reply in Opposition.....XX

Motion by plaintiff RE/MAX of New York Inc. and third-party defendants Pierre Titley, Ginette Lambert, and Can Am Holdings, Inc. for leave to renew and reargue their motion for summary judgment is **granted**. Upon reargument, partial summary judgment is **granted** to the parties as indicated below.

This is an action for a declaratory judgment that defendant Henry Weber is not a shareholder of plaintiff RE/MAX of New York Inc. RE/MAX is engaged in the business of franchising real estate brokers. On November 14, 1988, the shareholders of RE/MAX, including third-party defendant Can Am Holdings, Ltd. and non-parties Joseph Borzillieri and Marcel St. Onge, entered into a shareholders' agreement. The agreement contains a provision that shareholders must first offer to sell their stock to other shareholders before selling it to someone who is not a shareholder.

Weber joined RE/MAX as a consultant in 1997 and eventually became president of the company. Weber alleges that third-party defendant Pierre Titley, who is a director of RE/MAX and the principal of Can Am, promised to allow Weber to purchase a 30% interest in the company but did not draw up a stock purchase agreement. In 1998, Weber approached Marcel St. Onge who owned approximately 5% of the stock of the company.

On December 11, 1998, Weber and St. Onge entered into a written stock purchase agreement, whereby Weber agreed to purchase St. Onge's 15 shares for \$30,000. On December 22, 1998, St. Onge executed a stock power, purporting to transfer his 15 shares to Weber. On December 28, 1998, a stock certificate certifying that Weber was the holder of 15 shares was issued. On its reverse side, the stock certificate states that, "The shares represented by this certificate are subject to a shareholders' agreement dated as of November 14, 1988...Such shareholders' agreement provides...for certain restrictions on the sale, transfer...or other disposition of the shares...."

Weber alleges that in January 2015 Titley informed him that he intended to sell RE/MAX to its parent company, RE/MAX LLC, which is located in Denver. Weber alleges that Titley repeated his intention to sell RE/MAX to its parent in November 2015. On January 22, 2016, Weber sent a letter to RE/MAX, claiming to hold approximately 4% of the stock of the company and requesting his proportionate share of the sale proceeds.

On February 6, 2016, RE/MAX commenced this action, seeking a declaratory judgment as to Weber's status as a stockholder. RE/MAX alleges that Can Am Holdings is its sole shareholder. At around the same time, a telephone board of directors meeting was held to approve the sale of RE/MAX to its parent company. Titley and Sylvain Dansereau, another director, voted in favor of the sale. Weber voted against it.

On February 22, 2016, Titley and Sylvain Dansereau issued a "unanimous written consent" of the board of directors, purporting to remove Weber as president of RE/MAX.

In his answer, defendant Weber asserts counterclaims for depreciation in the value of his stock, wrongful termination, and violation of the federal Sarbanes-Oxley Act based upon his being a whistle blower. Weber also asserts a third-party claim against third-party defendants Pierre Titley,

Ginette Lambert who is Titley's wife, and Can Am Holding. Weber claims that third party defendants are depriving him of his fair share of the corporation's assets and profits.

By order dated August 12, 2016, plaintiff's motion for summary judgment dismissing defendant's counterclaim for violation of the Sarbanes-Oxley Act was **granted**. Sarbanes-Oxley is a federal criminal statute that does not give rise to a private right of action (18 U.S.C. § 1513; (**Shahin v Darling**, 606 F. Supp.2d 525, 539 [D. Del. 2009])).

However, plaintiff's motion for summary judgment with respect to its first cause of action for a declaratory judgment, as well as defendant's first counterclaim for depreciation in the value of his stock and second counterclaim for wrongful termination, and third-party defendants' motion for summary judgment dismissing defendant's third party claim, were denied.

Although in an unrelated case, **Integrity Real Estate Consultants v RE/MAX of New York and Henry Weber**, Index No 8794/07, defendant Weber assumed the position that he was not a stockholder of RE/MAX, Weber was not judicially estopped from claiming to be a shareholder. Plaintiff had not established that Weber prevailed on his motion to dismiss or otherwise secured a ruling in his favor (**Becerril v Dept. of Health**, 110 AD3d 517, 519 [1st Dept. 2013])).

Moreover, the December 11, 1998 stock purchase agreement with St. Onge and the RE/MAX stock certificate dated December 28, 1998, reflecting Weber's ownership of the 15 shares, was sufficient to defeat plaintiff's summary judgment motion. (**Essig v 5670 58 Street Holding Corp.**, 50 AD3d 948 [2d Dept. 2008]); **Matter of Rappaport**, 110 AD2d 639, 641 [2d Dept. 1985])).

By notice of motion dated October 6, 2016, plaintiff and third party defendants move for leave to renew and reargue their summary judgment motion. Plaintiff RE/MAX argues that, as a matter of law, Weber is not a shareholder of the corporation. Third-party defendant Ginette Lambert argues that she is a Canadian resident and not subject to personal jurisdiction in New York. Plaintiff argues that defendant Weber's counterclaims are derivative in nature. Plaintiff argues that Weber was an employee at will. Finally, plaintiff argues that Weber's stock certificate is invalid and the first offer provision contained in the November 14, 1988 RE/MAX shareholder agreement was not satisfied.

In opposition, plaintiff argues that the stock certificate is self-authenticating and third-party defendant Lambert waived the defense of lack of personal jurisdiction.

A stock certificate is written evidence of shareholder status and ownership in the corporation (BCL § 508; **Essig v 5670 58 Street Holding Corp.**, 50 AD3d 948 [2d Dept. 2008])).

As a general rule, courts must enforce shareholder agreements according to their terms. Such agreements avoid costly, lengthy litigation and promote reliance, predictability, and definitiveness in relationships among shareholders in close corporations (**Matter of Penepent Corp.**, 96 NY2d 186, 192 [2001])). However, like contractual rights generally, rights under a shareholder agreement may be waived.

The court notes that, as president of RE/MAX NY, Weber was not an outsider. Thus, selling stock to him would not create the disruption in relationships among shareholders that the first offer provision was intended to obviate. While there is no evidence that St. Onge complied with the first offer provision, in view of Weber's many years of high level management service for RE/MAX, the court concludes that the first offer provision was waived.

Accordingly, plaintiff's motion for leave to reargue its motion for summary judgment is **granted**. Upon reargument, plaintiff's motion for summary judgment with respect to its first cause of action for a declaratory judgment is **denied**. Upon searching the record, the court grants summary judgment to defendant Henry Weber and issues a declaratory judgment that Weber is the holder of 15 shares of RE/MAX of New York, Inc. In this regard, the court notes that Weber is entitled to the fair value of his shares, taking into account the subsequent "economic impact" of the transaction as to which he objects, namely the sale of RE/MAX NY to its parent company (**Friedman v Beway Realty Corp.**, 87 NY2d 161, 167 [1995]).

However, any officer elected or appointed by the board may be removed by the board with or without cause (BCL § 716). There is no evidence that Weber was elected or appointed as president of RE/MAX in any way other than by the board. Thus, Weber was properly removed as president of RE/MAX on February 22, 2016. Accordingly, plaintiff's motion for summary judgment dismissing defendant Weber's second counterclaim for wrongful termination is **granted**.

When considering the sufficiency of a complaint, the pertinent inquiry is whether the thrust of plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation (**Maldonado v DiBre**, 140 AD3d 1501, 1504 [3d Dept. 2016]). If the individual claim is "confused" or "embedded" within the derivative claim, then it must be dismissed (*Id.*). Leave to replead may be granted in an appropriate case (**Abrams v Donati**, 66 NY2d 951, 953-54 [1985]).

Defendant Weber's first counterclaim for diminution in the value of his stock is in actuality a derivative claim on behalf of RE/MAX against counterclaim defendant Pierre Titley for misappropriation of company funds for personal expenses (Aff of Henry Weber at ¶ 29). While the third-party claim is legally insufficient, the first counterclaim should have been pled as a derivative claim. Accordingly, plaintiff's motion for summary judgment dismissing the third-party claim is **granted**. Defendant Weber's first counterclaim is **dismissed** with leave to replead as a derivative claim.

So ordered.

Date: _____

NOV 29 2016


J.S.C.

ENTERED

DEC 06 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE