

Costello v Costello, Shea & Gaffney, LLP

2010 NY Slip Op 33058(U)

October 22, 2010

Sup Ct, Nassau County

Docket Number: 020129/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 8

MARIANNE K. COSTELLO, MICHAEL F.
COSTELLO, and KELLY V. KING, as co-executors
of the ESTATE OF JOSEPH M. COSTELLO, Deceased,

Plaintiffs,

-against-

INDEX NO.: 020129/2009
MOTION DATE: 08/13/2010
MOTION SEQUENCE: 003 and 004

COSTELLO, SHEA & GAFFNEY, LLP, FREDERICK
N. GAFFNEY, STEVEN E. GARRY, WILLIAM A.
GOLDSTEIN, PAUL E. BLUTMAN, ALAN T.
BLUTMAN, MARGARET SULLIVAN O'CONNELL,
DAVID N. ZANE, MICHAEL J. MORRIS, and
PATRICK G. REIDY,

Defendants.

The following papers were read on these motions:

Notice of Motion, Affidavit, Affirmation & Exhibits Annexed	1
Memorandum of Law in Support of Motion	2
Notice of Cross-Motion, Affirmation, Affidavit & Exhibits Annexed	3
Affirmation of William A. Goldstein in Reply and Opposition to Cross-Motion & Exhibit Annexed	4
Transcript of July 1, 2010 Directing Motions Under Seal	5

PRELIMINARY STATEMENT

Defendants move for summary judgment dismissing the complaint pursuant to both CPLR §§ 3211 and 3212. Plaintiffs cross-move for summary judgment against defendant on the first cause of action, which seeks an accounting and payment to plaintiffs the contents of the capital account of plaintiffs' decedent in the defendant Costello, Shea & Gaffney, LLP.

BACKGROUND

This matter involves the dissolution of a law firm and distribution of assets of the firm and personalty located in the offices of the law firm which are claimed to be personal property of decedent Joseph M. Costello. Defendants contend that the resolution of the matter turns on the application of the 1993 partnership agreement, and no discovery is required.

The Complaint

The complaint contains two causes of action: the first is for an accounting and payment of the contents of the Joseph M. Costello capital account in the amount of \$134,760; the second is for replevin of items of personalty, "such as family pictures, office decorations, statues and busts, furniture, bric-a-brac, keepsakes, personal letters and files and correspondence, diplomas, and certificates of award and recognition".

The amended verified answer consists of a general denial and four affirmative defenses, the fourth of which is that the action is barred by documentary evidence which defines the interest of Joseph M. Costello in Costello, Shea & Gaffney, LLP.

The Agreements

By Agreement effective January 1, 1993, Joseph M. Costello, Mortimer C. Shea, Frederick N. Gaffney and Steven E. Garry agreed to continue their law practice through the firm of Costello & Shea, to be known as Costello, Shea and Gaffney. Equity ownership was divided into points, with Costello having 36 points, Shea 26 points, Gaffney 36 points, and Garry 12 points. Section 6 of the Agreement deals with death or retirement of Joseph M. Costello and Mortimer C. Shea:

6. Should Joseph M. Costello elect retirement, it is agreed that the partnership shall use its best efforts to pay to Joseph M. Costello the sum of \$100,000 annually, such payments to include first the return of his capital for a period up to and including December 31, 1999, and thereafter the sum of \$50,000 until his demise. Additionally, should Mortimer C. Shea and/or Joseph M. Costello have been retired from practice and should die prior to December 31, 1999, the partnership shall continue to pay each's estate the retirement sums referenced above until December 31, 1999.

None of the payments payable to Mortimer C. Shea, or to Joseph M. Costello referred to above shall be deemed to be a personal

obligation of any of the signatories to this agreement; rather, these are obligations of the firm and upon the firm's inability to pay same, no obligation devolves upon any of the partners individually.

Upon the retirement or death of Mortimer C. Shea and Joseph M. Costello, he or his estate shall surrender his entire capital interest in the firm to the firm which shall then revert to the remaining members of the executive committee for distribution to any member or members thereof in its sole discretion, without regard to any other proposition.

This Agreement was modified effective June 15, 1993, for the purpose of extending equity in the partnership to Paul E. Blutman and Donald J. Scialabba. The equity interest of each of the partners was modified to provide 31 points to Costello, 24 points to Shea, 26 points to Gaffney, 12 points to Garry, 4 points to Blutman and 3 points to Scialabba. Blutman and Scialabba agreed to be bound to the prior agreement. The Agreement provided for the expulsion from the firm of any person whose interest does not exceed 7% by 51% vote of the capital points, and the setting of the draw and income points applicable to such individuals by the executive committee. It concluded by providing that "(a)ll of the terms, condition (sic.) and obligations of the previous written agreement of partnership remain in full force and effect, and the signatories to this agreement shall be bound by all of its terms, conditions, and obligations.

Exhibit "C" to the motion is a handwritten memorandum from Joe Costello to the other members of the firm, in which he refers to prior memoranda of 6/10/98 and 7/9/98, to which he requested a written response. He did not receive one and set forth proposals for modifications of the partnership agreement, essentially calling upon the Firm to rescind Section 6, and provide instead for the payment of his capital account to his estate in four annual installments. There is no evidence that the parties agreed to the requested modifications.

Plaintiffs acknowledge the 1993 Agreement, but contend that the term "capital interest in the firm" is different from the term "capital account". They contend that such an interpretation renders the first full paragraph of Section 6 meaningless because it would eliminate the capital account out of which a retired partner's annual payments were to be made under that Section. They point to the last paragraph of Section 6, which states that "(u)pon the retirement or death of Mortimer C. Shea and Joseph M. Costello, he or his estate shall surrender his entire capital

interest in the firm to the firm which shall then revert to the remaining members of the executive committee for distribution to any member or members thereof in its sole discretion, without regard to any other proposition”, as nullifying the retirement payment provisions in the first paragraph.

They argue that a literal reading results in a forfeiture of the capital account if the terms “capital account” and “capital interest” are identical, thus precluding a payment in accordance with the first paragraph. They contend that “capital interest” means the number of allocated points, and the concomitant ability to participate in voting in connection with the operation of the law firm. Thus, they contend, there was never a forfeiture of the capital account, and the Estate of Joseph M. Costello is entitled to receive it.

DISCUSSION

The Court agrees that the contract is subject to interpretation without resort to outside documents, parol evidence, or further discovery.

It is a general legal principle that a contract should be interpreted so as to give meaning to all its terms. (*Corhill Corp. v. S.D. Plants, Inc.*, 9 N.Y.2d 595, 599 [1961])(internal citations omitted). In order to give effect to all portions of Section 6 of the Agreement, the terms “capital account” and “capital interest” must have different meanings. If, on retirement, either Costello or Shea relinquished their interest in their capital account, to be distributed by the executive committee to any member or members in their sole discretion, it would be impossible to pay them \$100,000 per year, going first to the repayment of the capital account, because they would have none.

Defendants annex a handwritten memorandum from Costello, which they contend reflects his understanding that he would forfeit his capital account if he failed to retire. The Court’s interpretation of this document, although not necessary for the decision, is that Costello understood that his capital account, upon which he had paid income tax when earned, was his, and should not be used to pay him his retirement payments of \$100,000. Rather, he wanted, in addition to his retirement payments, disbursement of his capital account in four equal annual payments. There is no evidence that he considered his capital account forfeited upon his death or retirement.

Costello never retired and was a member of the firm when he died in 2007. The agreement is actually silent on the distribution of the capital account upon death. The surrender upon death or retirement can only refer to voting rights in the operation of the law firm. In fact, it appears that the Costello capital account had an opening balance of \$134,760 in 2007. It increased by \$8,250 by the end of 2007, and this sum was paid to his estate. The closing balance of the account was \$0, without explanation as to the opening balance.

Defendants' treatment of the payment of the \$8,250 increase for 2007 is inconsistent with their claim that decedent's claim to his capital account terminated upon his death. If it did, he would not have been entitled to any payment from the account.

Defendants' motion for summary judgment dismissing the complaint is denied.

Plaintiffs' cross-motion for summary judgment on the first cause of action is granted.

If the issue of the personal property was not settled pursuant to the oral argument held on July 1, 2010, then the plaintiffs are directed to submit to the Court, with a copy to their adversary, an itemization of the property for which replevin is sought, within thirty (30) days of the date of this Decision. The matter is presently scheduled for a compliance conference on November 23, 2010, at 9:30 A.M., by which time the parties are expected to have communicated with one another in a good faith effort to resolve the issue of ownership of the personalty.

Dated: October 22, 2010


J.S.C.

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OCT 26 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE