SHORT FORM ORDER

INDEX
NO.: 18199-03

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 10-20-04
SUBMITTED: 12-22-04
MOTION NO.: 002-MD
003-MD

GLORIA DEMATTEO, as Executrix of the ESTATE OF EDWARD DEMATTEO,

Plaintiff,

-against-

DEMATTEO SALVAGE CO., INC., and E & J HOLDING CORP.,

Defendants.

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Upon the following papers numbered 1 to 43 read on this motion to compel and for partial summary judgment and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-18 ; Notice of Cross Motion and supporting papers 20-21 ; Answering Affidavits and supporting papers 22-29 ; Replying Affidavits and supporting Papers 30-38 ; Other 39-43 it is,

ORDERED that the branch of the motion by the plaintiff which is for an order granting partial summary judgment in her favor and the cross motion by the defendants for an order granting summary judgment in their favor are denied, and it is further

ORDERED that the branch of the motion by the plaintiff which is for an order compelling discovery is denied as academic.

In June 1966, Dominick DeMatteo, Edward DeMatteo, Carmine DeMatteo, and Joseph DeMatteo, the stockholders of the defendant corporations, entered into stock purchase agreements (buy/sell agreements) providing for the mandatory purchase by the defendants of the shares of a deceased shareholder. The agreements are mirror images of each other and provide, in pertinent part, as follows:

> 2. Upon the death of any Stockholder, the Corporation shall purchase, and the executor or administrator (hereinafter called the "Legal Representative"), of the deceased Stockholder shall sell to the corporation, all of the stock of the corporation owned by the Deceased at the time of his death for the price and upon the terms and conditions hereinafter stipulated.
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> 3. Upon the death of a Stockholder the purchase price of the decedent's stock of the Corporation shall be its value, which is and shall be determined as follows:
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> The Corporation and the Stockholders mutually agree that unless and until a new value is established as herein provided, the value of said stock shall be per share. Such value, as agreed upon and as may be redetermined hereafter, is and shall be inclusive of an amount representing the value of the good will of the Corporation. Such value may be redetermined at any time by mutual agreement of the Corporation and the Stockholders, the Corporation acting through its proper officer upon due authorization of its Board of Directors. Consideration of such value shall be made a regular order of business at the annual meeting of the Stockholders of the Corporation. The last value established preceding the death of a Stockholder shall be the value of his stock for the purposes of this agreement. This provision shall not be altered by the fact that the Corporation and the Stockholders for any reason have failed to redetermine such value at any time or from time to time. All redeterminations of value shall be endorsed upon Schedule A hereof, dated ad signed by the Corporation and the Stockholders.

The agreements also provide that the defendants procure insurance policies on the lives of the stockholders in order to purchase their shares.

At the time of his death on June 9, 2002, Edward DeMatteo held 27 shares of the defendant DeMatteo Salvage Co., Inc., and 20 shares of the defendant E & J Holding Corp. The plaintiff contends that, pursuant to the minutes of the March 10, 1992, Special Board of Directors/Stockholders Meetings of the defendant corporations, it was resolved to table the re-evaluation of the corporations and the stock shares until October 1992, and to keep the previously set corporate values of $4,700,000 for DeMatteo Salvage (or $66,197 per share) and $4,000,000 for E & J Holding (or $66,666 per share). Thus, the plaintiff contends that the last redetermination of value of corporate stock was in 1992. The defendants contend that the stockholders have failed to redetermine the value of the stock on a yearly basis, in accordance with paragraph 2 above, since 1981. In 1981, the last date for which a per-share value is reflected on Schedule A, DeMatteo

Salvage was valued at $7,500 a share and E & J Holding was valued at $10,000 a share. Both sides move for summary judgment.

When parties set down their agreement in a clear, complete document, their writing should, as a rule, be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended, but unstated or misstated, is generally inadmissible to add to or vary the writing (*see*, **W.W.W. Associates v Giancontieri**, 77 NY2d 157, 162; **Automotive Mgmt. Group v SRB Mgmt. Co.** 239 AD2d 450; Matter of Ajar 237 AD2d 597). In the absence of any ambiguity, there are only documents to interpret, and the issue is one of law to be determined by the court (*see,* **Automotive Mgmt. Group v SRB Mgmt. Co.**, *supra*).

Here, the agreements expressly provide that redeterminations of value shall be by mutual agreement and endorsed upon Schedule A, dated and signed by the corporation and the stockholders, and that the last value established prior to the death of a stockholder shall control. Thus, the terms of the agreements are clear and unambiguous. The plaintiff's contentions to the contrary notwithstanding, the minutes of the March 10, 1992, Special Board of Directors/ Stockholder Meetings are not controlling. Since Dominick DeMatteo was not present at that meeting, the valuations of corporate stock adopted thereat were not mutually agreed upon. Moreover, there is no evidence that they were endorsed upon Schedule A and signed by the corporation and the stockholders, in accordance with paragraph 2 of the parties' buy/sell agreements.

For the movant to prevail on a motion for summary judgment it must clearly appear that no material and triable issue of fact is presented (*see*, **Di Menna & Sons v City of New York**, 301 NY 118). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*see,* **Braun v Carey**, 280 AD 1019) or where the issue is "arguable" (*see,* **Barrett v Jacobs**, 255 N Y 520); "issue-finding, rather than issue-determination, is the key to the procedure" (*see,* **Sillman v Twentieth Century-Fox Film Corp.,** 3 NY2d 395, citing to **Esteve v Abad**, 271 AD 725).

In opposition to the defendants' cross motion, the plaintiff submits copies of the minutes of the April 2, 1984, December 5, 1984, and December 8, 1986, Board of Directors/Stockholders Meetings for both DeMatteo Salvage and E & J Holding and the minutes of the November 13, 1985, Board of Directors/Stockholders Meeting for E & J Holding. Those minutes reveal that, with all of the stockholders present, the value of DeMatteo Salvage was set at $2,000,000 (or $20,000 per share) and the value of E & J Holding was set at $1,400,000 (or $17,500 per share) in 1984 and 1985 and $3,000,000 (or $37,500 per share) in 1986. They also reflect that those valuations were recorded on the parties' buy/sell agreements and that each stockholder consented thereto and affixed his signature thereon.

Business Corporation Law § 624 (a) provides, in pertinent part, that each corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its shareholders, board, and executive committee, if any. Business Corporation Law § 624(c) provides that the books and records specified in paragraph (a) shall be

prima facie evidence of the facts therein stated in favor of the plaintiff in any action or special proceeding against the corporation or any of its officers, directors, or shareholders. Thus, the minutes of the April 2, 1984, December 5, 1984, and December 8, 1986, Board of Directors/ Stockholders Meetings for DeMatteo Salvage and E & J Holding and the minutes of the November 13, 1985, Board of Directors/Stockholders meeting for E & J Holding are prima facie evidence that the defendant corporations redetermined the value of their stock after 1981 in accordance with the parties' buy/sell agreements. Since Schedule A does not reflect those redeterminations, there are questions of fact as to whether the DeMatteo brothers mutually agreed to redetermine the value of the stock of the defendant corporations after 1981 and whether they took all steps necessary to redetermine the value in accordance with the buy/sell agreements.

Since the value of the plaintiff's stock cannot be determined at this time, both motions for summary judgment are denied. The discovery issues were resolved at a conference with the parties on November 18, 2004. Any remaining discovery issues are referred to the next conference on February 17, 2005.

DATED: February 8, 2005

HON. ELIZABETH HAZLITT EMERSON

J. S.C.