

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C.

PART 1

Index Number : 600396/2008
FEROLITO, JOHN M.
VS.
VULTAGGIO, DOMENICK J.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 600396/08
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...
Notice of Cross-Motion
Answering Affidavits — Exhibits _____

PAPERS NUMBERED

1
2, 3, 4
5

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion are*
decided in accordance with the attached order.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: May 21, 2009

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 1

----- X
JOHN M. FEROLITO *et al.*,

Plaintiffs,

INDEX NO. 600396/08

-against-

DOMENICK J. VULTAGGIO *et al.*,

Defendants.

----- X
DOMENICK J. VULTAGGIO *et al.*,

Counterclaim and Third-Party Plaintiffs,

INDEX NO. 590967/08

-against-

JOHN M. FEROLITO *et al.*,

Counterclaim and Third-Party Defendants

----- X
MARTIN SHULMAN, J.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and a notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Motion sequence numbers 003 and 006 are consolidated for disposition. In motion sequence number 003 plaintiff AriZona Beverage Acquisition, LLC ("AB Acquisition") and third-party defendant Patriarch Partners, LLC ("Patriarch") move for an order pursuant to CPLR 3212 granting the declaratory relief sought in Count 1 of plaintiffs' complaint and dismissing defendants' second and third counterclaims and third and fourth third-party claims.

Defendants Domenick J. Vultaggio; Spencer Vultaggio; Wesley Vultaggio; DV Capital, L.P.; David Menashi, as co-trustee for the Vultaggio Family 1996 Special Trust; Roseann M. Rochford (collectively the "Vultaggio Group") and the AriZona Entities (see *infra*) cross-move for an order pursuant to CPLR 3212 granting them summary judgment on their seventh counterclaim and dismissing Count 1 of the complaint.

In motion sequence number 006 plaintiffs John Ferolito, individually and as co-trustee for the John Ferolito, Jr. Grantor Trust; Richard N. Adonailo, as co-trustee for the Ferolito Family 1996 Special Family Trust and the John Ferolito, Jr. Grantor Trust; JF Capital, L.P.; JMF Investment Holdings, Inc.; Elizabeth Ann Barulic (collectively the "Ferolito Group") and Richard N. Adonailo, in his individual capacity ("Adonailo"), move for an order pursuant to CPLR 3212 for partial summary judgment granting declaratory relief pursuant to Count 1 of the complaint and dismissing the first, third, seventh and eighth counterclaims in defendants' answer.

In this declaratory judgment action the Ferolito Group seeks a declaration that a restriction in a shareholders' agreement (the "Owners' Agreement") between it and the Vultaggio Group, which prevents the Ferolito Group from selling its 50% interest in closely held corporations, partnerships and limited liability companies referred to herein as the AriZona Entities to a third party, constitutes an unlawful restraint on the transfer of property.

In 1998, John Ferolito ("Ferolito") and Domenick Vultaggio ("Vultaggio"), and the shareholder-members of their respective families entered into the Owners' Agreement (Exhibit 3 to March 3, 2009 reply affidavit of Domenick Vultaggio) to govern the management and ownership of the AriZona Entities, which were jointly owned by the two families. Section 4.1(a) of the Owners' Agreement provides that "no Transfer [defined to include any transaction involving an ownership interest in one or more of the AriZona Entities] shall be permitted at any time." However, section 4.1(c) authorizes sales or other transfers to a defined group of "Permitted Transferees" consisting of: "(i) any Affiliate of [the transferring] Owner, (ii) any lineal descendant, lineal ancestor,

sibling or spouse of any such Owner, (iii) in the case of death, any personal representative or executor of such Owner, (iv) any trust for the benefit of, and any corporation, partnership or other entity, all of the interests of which are at all times held by, [sic] only the transferring Owner and any persons with respect to such Owner described in subparagraphs (i), (ii) and/or (iii) above, or (v) any other Owner."

On August 8, 2008 the Ferolito Group entered into a Purchase Agreement with AB Acquisition under which AB Acquisition's affiliate Patriarch acquired a 2% interest in the AriZona Entities with an option to purchase an additional 23% interest for an overall price of \$4.32 billion. When Ferolito informed Vultaggio of the Purchase Agreement, Vultaggio responded that the Ferolito Group's sale of its interest in the AriZona Entities was unacceptable. This action followed.

In October 2008 the Ferolito Group, together with AB Acquisition, filed their First Amended Complaint (the "complaint"). Count I of the complaint (the cause of action at issue herein) contains a request for a declaratory judgment stating the following: (i) Section 4.1 of the Owners' Agreement is invalid and unenforceable; (ii) section 3.1 of the Owners' Agreement (which provides that all matters with respect to the AriZona Entities shall be resolved by mutual agreement of the Ferolito Group and the Vultaggio Group) does not concern the sale of an ownership interest in the AriZona Entities, and to the extent it does, such provision is invalid and unenforceable; (iii) any current or future owner of an interest in the AriZona Entities may sell such interest to a prospective buyer without the constraints imposed by the Owners' Agreement; (iv) the Purchase Agreement with AB Acquisition is valid and enforceable; and (v) AB Acquisition is entitled to exercise its option under the Purchase Agreement.

The Vultaggio Group responded with an answer (Exhibit B to plaintiffs' moving papers in mot. seq. no. 006) containing counterclaims. The first counterclaim asserts a claim for breach of contract against the Ferolito Group for alleged violations of the Owners' Agreement's restrictions on the sale of interests in the AriZona Entities. The second counterclaim asserts a claim of tortious interference with contract against AB Acquisition. The third counterclaim seeks rescission of the Purchase Agreement on the ground that the transfer of the Ferolito Group's interest to AB Acquisition violated the Owners' Agreement's restrictions on transfers. The seventh counterclaim requests a declaratory judgment that the transfer restrictions in the Owners' Agreement are valid and enforceable. The eighth counterclaim seeks a permanent injunction enjoining the Ferolito Group from transferring its interests in the AriZona Entities other than to a Permitted Transferee.

The Vultaggio Group also commenced a third-party action against Patriarch asserting claims for, *inter alia*, tortious interference with contract (the third claim) and rescission (the fourth claim).

The motion by AB Acquisition and Patriarch (seq. no. 003) tracks the motion by the Ferolito Group and Adonailo (seq. no. 006), who contend that the restrictions in the Owners' Agreement, which prohibit the transfer of ownership interests in the AriZona Entities to anyone other than a Permitted Transferee, are an unlawful restraint on the transfer of property and therefore invalid as a matter of law.

This court disagrees. Plaintiffs' reliance on *Allen v Biltmore Tissue Corp.*, 2 NY2d 534 (1957) and *Rafe v Hindin*, 29 AD2d 481 (2d Dept), affd 23 NY2d 759 (1968) is misplaced. *Allen* did not involve a closely held corporation. While *Rafe* involved only

two shareholders, the restriction on the sale of stock by one within the other's lifetime was unsupported by any rationale and therefore constituted an outright prohibition against a sale, which is not permissible (see *Levey v Saphier*, 83 Misc2d 146, 151 [Sup Ct Nassau Co 1975], affd, 54 AD2d 959 [2d Dept 1976]). By contrast, restrictions which are reasonable and appropriate to a lawful purpose will be upheld. *Id.*; see also *Ruttenberg v Davidge Data Systems Corp.*, 215 AD2d 191, 195 (1st Dept 1995)(transfer restriction justified where purpose was to penalize disloyal employee). Here, we are dealing with a business entity that is jointly and equally owned by two principals and their respective families. Section 1.4 of the Owners' Agreement (see Vultaggio affidavit, *supra*, exhibit 3) labeled "Purpose of Agreement" (emphasis in original) states in pertinent part that "The purpose of this Agreement is ... to assure continuity of ownership and management of the AriZona Entities" Given Ferolito's and Vultaggio's goal of providing for their families, the transfer restriction is appropriate and valid (see *Levey v Saphier*, 54 AD2d 959, 960 [2d Dept 1976] [reasonableness of stock transfer restriction should be viewed in light of circumstances and purposes sought to be accomplished]; *cf.*, *Schultz v 400 Coop. Corp.*, 292 AD2d 16, 19-20 [1st Dept 2002] ["the fairness of a bargain is appropriately assessed at the time of its making, not from the perspective of intervening events that render performance of its obligations more difficult or more expensive"]).

On the other hand, Ferolito's flirtation with AB Acquisition, which resulted in the Purchase Agreement, borders on unconscionable. The business relationship between Ferolito and Vultaggio goes back to 1973 when they were young adults. In 1992, by

which time they had become sophisticated business individuals, they formed AriZona Iced Tea (which morphed into the AriZona Entities) and agreed that all profits from the enterprise would be split 50/50 between their two families. The ensuing Owners' Agreement, which was intended to reflect the equal familial interests in the AriZona Entities, was signed in 1998 after a law firm they selected guided them through three years of extensive negotiations and numerous reviews of agreement drafts. Ferolito's callous disregard of the explicit obligations he knowingly undertook could not be countenanced by the court even if his strained arguments had a valid basis, which they do not.

Defendants have raised the issues of equitable estoppel and the statute of limitations. Under the doctrine of equitable estoppel Ferolito and his group cannot now disavow the Owners' Agreement (and the transfer restriction contained therein) after benefitting from that Agreement for a decade (see *Schultz v 400 Coop. Corp.*, *supra*, at 20 ["As a matter of equity, having acceded to the terms of a bargain for over a decade before seeking judicial intervention, plaintiffs are estopped to complain that it was unfair."]; *Savasta v 470 Newport Assocs.*, 180 AD2d 624, 626-627 [2d Dept 1992], *aff'd* 82 NY2d 763759 [1993] [partners who accepted benefits of co-op conversion for 22 months estopped from claiming conversion of apartments was a "disposition" and terminating partnership on that basis]). In addition to lacking merit, plaintiffs' quest for declaratory relief is barred by the doctrine of equitable estoppel.

Although academic in view of the above, the court finds that plaintiffs' claim (Count 1 of the complaint) is not barred by the six-year statute of limitations applicable to contract actions (CPLR §213[2]). The claim did not arise (*i.e.*, become a justiciable

controversy) and the applicable statute of limitations did not begin to run until August 2008 when Vultaggio advised Ferolito that the Purchase Agreement with AB Acquisition was unacceptable (see *Charney v North Jersey Trading Corp.*, 172 AD2d 390, 391 [1st Dept 1991]).

Defendants' cross-motion for summary judgment (seq. no. 003) will be granted. "The rule in this State is well settled that the construction of a plain and unambiguous contract is for the court to pass on, and that circumstances extrinsic to the agreement will not be considered when the intention of the parties can be gathered from the instrument itself" (*West, Weir & Bartel, Inc. v Mary Carter Paint Co.*, 25 NY2d 535, 540 [1969]; see also *Pharmaceutical Horizons, Inc. v Sterling Drug, Inc.*, 127 AD2d 514 [1st Dept 1987] ["when ... the court can determine the parties' intent by looking at the agreement, the issue is one of law and should be decided by summary judgment"]). The court has considered the parties' remaining arguments and finds them unavailing.

Finally, Ferolito's affidavits in support and in further support of plaintiffs' motion were notarized in the state of Florida by a Florida notary and submitted without the authenticating certificate required by CPLR 2309 (c). While this error can be forgiven and remedied *nunc pro tunc* (see *Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504 [1st Dept 2007]), there is no reason to do that here because, after reading what he has to say, the court finds that Ferolito's pronouncements have no impact on the findings herein.

Accordingly, it is hereby

ORDERED that the motion by AB Acquisition and Patriarch for summary judgment (seq. no. 003) is denied; and it is further

ORDERED that the cross-motion by the Vultaggio Group and the AriZona Entities for summary judgment (seq. no. 003) is granted; and it is further

ORDERED, ADJUDGED and DECLARED that the transfer restrictions in the Owners' Agreement are valid and enforceable; and it is further

ORDERED that Count 1 of the complaint is dismissed; and it is further

ORDERED that the motion by the Ferolito Group and Adonailo (seq. no. 006) is denied.

The Clerk is directed to enter judgment accordingly.

This constitutes this court's Decision, Order and Judgment. Courtesy copies of this Decision, Order and Judgment have been provided to counsel for the parties.

DATED: New York, New York
May 21, 2009



HON. MARTIN SHULMAN, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).