

Giaino v EGA Assoc. Inc.
2009 NY Slip Op 09277
Decided on December 15, 2009
Appellate Division, First Department
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Decided on December 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

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[*1]Robert T. Giaino, etc., Plaintiff-Appellant,

v

EGA Associates Inc., et al., Defendants-Respondents.

Putney, Twombly, Hall & Hirson LLP, New York (Philip H. Kalban of counsel), for appellant.

Holland & Knight LLP, New York (Mitchell J. Geller of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 30, 2008, which denied plaintiff's motion for summary judgment on his claims for declaratory and injunctive relief, and granted defendants' cross motion for leave to amend the answer to add an affirmative defense, unanimously reversed, on the law, with costs, plaintiff's motion granted and defendants' cross motion denied, it is declared that the purported transfer and sale of one share of stock from the decedent Edward P. Giaino, Jr., to defendant Janet Giaino Vitale is null and void ab initio, defendant EGA Associates Inc. is directed to cancel any and all share certificates issued to Janet and Edward on or after March 13, 2007 and to

issue new share certificates to Edward's estate and to Janet in the same share amounts as reflected in the certificates that existed as of March 12, 2007, and it is declared that any actions and resolutions passed at the shareholders meeting on July 23, 2007, including the election of Joseph O. Giaino as a director, and at a meeting of the board of directors on July 30, 2007 are null and void.

The transfer restrictions printed on the back of the share certificates should have been enforced (*see Matter of Penepent Corp.*, 96 NY2d 186, 192 [2001]); *Gallagher v Lambert*, 74 NY2d 562, 567 [1989]; Uniform Commercial Code § 8-204). The restrictions prohibit the transfer of shares without granting the corporation 30 days' written notice and the first option to purchase the shares. The corporation was owned in equal shares by Edward P. Giaino, Jr., now deceased, and his two siblings, plaintiff Robert T. Giaino and defendant Janet Giaino Vitale. We reject defendants' argument that, as the president of the corporation, Edward was authorized to sell a controlling share of stock to Janet because he had offered it first to the corporation, through himself, and the corporation, through him, had waived its right to purchase it. As the president of a closely held corporation, Edward lacked the power to act unilaterally against Robert's interest (*see Barbour v Knecht*, 296 AD2d 218, 227 [2002]; *see also Tidy-House Paper Corp. of N.Y. v Adlman*, 4 AD2d 619, 621 [1957]; *Sterling Indus. v Ball Bearing Pen Corp.*, 298 NY 483, 491 [1948]).

Defendants' proposed affirmative defense, that the transfer restrictions are invalid, is without merit. Their argument that such restrictions are invalid if there are no corporate documents evidencing their approval is unsupported in law. Moreover, the three shareholders accepted these restrictions without objection and relied on them until after this litigation was [*2]commenced (*see Cannavino v Davis*, 289 AD2d 360 [2001]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 15, 2009

CLERK