

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : IAS PART 12

-----X
MICHELE E. KUN,

Plaintiff,

-against-

Index No. 3709/07

JACQUELINE I. FULOP and BUCKED TOOTH
REALTY CORP.,

Defendants.

-----X
Present: Hon. LEONARD B. AUSTIN, J.S.C.

Attorney for Plaintiff

LaReddola, Lester & Associates, LLP
By: Steven M. Lester, Esq.
600 Old Country Road
Garden City, NY 11530

Attorney for Defendants

Kevin E. Rockitter, P.C.
By: Kevin E. Rockitter, Esq.
180 Froelich Farm Boulevard
Woodbury, NY 11797

DECISION AFTER TRIAL

This action was commenced by Plaintiff, Michele E. Kun ("Kun"), seeking a declaration that she is, and has been since its inception, a 50% shareholder in Defendant, Bucked Tooth Realty Corp. ("Bucked Tooth"), and that as such she is entitled, pursuant to Business Corporation Law ("BCL") §624, to inspect its corporate books and records.

Defendants denied the essential allegations of the complaint and alleged the affirmative defenses of failure to state a cause of action, statute of frauds, statute of

limitations, laches and equitable estoppel. The two counterclaims by Defendant, Jacqueline I. Fulop ("Fulop"), were withdrawn at the commencement of the trial.

FINDINGS OF FACT

Kun and Fulop are dentists. Kun is a pediatric dentist. Fulop is an orthodontist. Since July 2003, they have shared office space at 40 Crossways Park Drive, Suite 105, Woodbury, NY ("Dental Office"). The lease for the Dental Office was taken in the name of Bucked Tooth of which Fulop is designated as the sole shareholder. The sole asset of Bucked Tooth is the leasehold interest in the Dental Office.

The parties met in the Summer of 1998 and became friends. They shared a house in the Hamptons and traveled to Greece together. Fulop is Kun's son's godmother. Kun was a member of Fulop's wedding party.

At various points, they discussed practicing as a partnership in New York City where they both then lived and worked. Recognizing that they had different practice areas, the idea was for them to share an office and cross-refer patients. No agreement was ever reached with regard to this concept.

In 2002, Fulop found office space in Woodbury, NY which ultimately became the Dental Office. She negotiated the lease which was executed on January 14, 2003 (Dx D)¹. Kun never had any involvement in identifying the location of the premises, negotiation of the lease or the "build out" of the office. Fulop never expected that Kun

¹ Plaintiff's trial exhibits will be designated herein as "Px__". Defendant's trial exhibits will be designated as "Dx__".

would even be interested in moving her New York City based practice to Long Island.

Kun went to see the Dental Office with Fulop's husband and expressed interest in being an equal partner in the leasehold. Fulop never agreed to that. She saw Kun only as a subtenant. No agreement was ever reached with regard to Kun's participation in Bucked Tooth or with regard to the dental practices each pursued.

No shares of Bucked Tooth were ever issued to Kun. The Bucked Tooth corporate book (Px 23) reflects that of the 100 authorized shares only ten shares were issued and those were to Fulop.

Further, Fulop determined to designate Bucked Tooth as a Sub-chapter S corporation (Px 15, 16). Accordingly, only Fulop received K-1's from Bucked Tooth for the years 2003 through 2006 (Dx XX, YY, ZZ, AAA). Kun never inquired as to her entitlement to a K-1.

Although she was not a shareholder, Kun contributed \$1,000 to seed the corporate bank account (Px 2). For convenience, Fulop was given the title of "Vice President" on the bank corporate resolution (Px 1). The bank account was used solely as a conduit to pay rent. That is, each party would pay one-half of the monthly rent into the Bucked Tooth account from which a single rent check was issued to the landlord.

The Dental Office lease was negotiated by Fulop's long-time attorney, Joseph Slater, Esq. ("Slater"). Kun felt that Slater was representing her as well even though there was no retainer agreement. Such a view was validated when Fulop demanded that she pay one-half of Slater's invoice for legal services rendered as well as for the

incorporation of Bucked Tooth (Px 4). Kun did so (Px 3). However, from the testimony adduced, it is clear that Slater represented only the Defendants herein. It appears that payment of Slater's invoice was part of the consideration for Kun's involvement in the Dental Office.

In addition, to equip the Dental Office, the parties purchased various items of dental equipment which were generally needed in a dental office as well as items particular to their respective practices. On October 14, 2003, both Fulop and Kun entered into an equipment lease with Group Financial Services (Px 6). They also both executed a progress payment agreement, dated February 14, 2003 (Px 7). Both of these documents were signed by Fulop and Kun as "owners". Such designation did not reflect any involvement of Bucked Tooth in the transaction. It appears that the parties identified themselves as owners of the financed equipment; not the dental practice or the leasehold.

As the Dental Office was opened, an announcement (Px 18) was sent to patients of Fulop and Kun. The announcement which appears to have been ordered in June 2003 and sent thereafter stated: "Dr. Jacqueline I. Fulop-Goodling is proud to announce that Dr. Michele Kun has joined her practice as a *partner* specializing in Pediatric Dentistry. Our new location as of July 1st: 40 Crossways Park Drive, Woodbury, NY, (516) 921-6010 (same number)" (emphasis added). Kun contends that such designation demonstrates that she is entitled to an ownership interest in Bucked Tooth. Fulop argues that giving Kun such status with the patients enhanced the practice but

did not have any legal effect on their expense-sharing relationship.

For the most part, the parties continued in their relationship without serious incident until October 2006, when Kun retained counsel to seek documentary proof of her one-half ownership in Bucked Tooth (Px 9). That request was met with a response from Slater which reflected that Fulop intended to only have a landlord-tenant relationship with Kun, that her payment of legal expenses related to the leasehold were part of the consideration for her being a tenant and that Slater never represented Kun (Px 10).

In January 2007, Slater wrote to Kun on behalf of Bucked Tooth terminating her tenancy (Px 11). This action was commenced on March 1, 2007. Several months later, in May 2007, Bucked Tooth forwarded a second letter to Kun terminating her tenancy (Px 12).

CONCLUSIONS OF LAW

Kun urges that she is entitled to a declaration that she is a one-half owner of Bucked Tooth. She points to her designation as "Vice President" on the bank corporate resolution, the announcement card referring to her as a "partner", their signing as "owners" on the equipment lease agreements and her payment of one-half of Slater's invoice. This Court disagrees.

The announcement card and equipment lease deal with the parties' respective dental practices. They have nothing to do with Bucked Tooth or the leasehold. The

evidence demonstrates that the parties had an expense sharing relationship; nothing more.

In addition, no stock certificate in Bucked Tooth was ever issued to Kun. Standing alone, that fact is not determinative of the claim herein. Rocha Toussier y Asociados, S.C. v. Rivero, 184 A.D.2d 397, 398 (1st Dept. 1992); and Matter of Benincasa, 141 A.D.2d 636, 638 (2nd Dept. 1988). To support her claim for Bucked Tooth stock, Kun urges that, pursuant to BCL §504, she paid good and adequate consideration for a number of Bucked Tooth shares equal to that which Fulop received.

Such a claim must fail inasmuch as BCL §504 contemplates that there was an agreement for the issuance of the stock in return for certain consideration. No such agreement has been presented by Kun on this trial. Instead, Kun paid certain obligations as demanded by Fulop on the assumption that she would have an equal stock ownership in Bucked Tooth. No testimony or proof has been adduced demonstrating any understanding or meeting of the minds of the parties so as to invoke BCL §504's protection. Kun's assumptions with regard to her business relationship with Fulop cannot translate into an overt agreement for her becoming an equity owner of Bucked Tooth. Thus, without more, Kun's payments and actions must thus be viewed in the context of a landlord-tenant relationship.

It is significant to note that Kun testified that she realized that she was not a shareholder in Bucked Tooth in 2004. Yet, she continued in the relationship without demanding any rights of a shareholder until October 2006 when her attorney sent a

demand letter (Px 9). She did not press the issue until two months after the Slater termination letter (Px 11), when this action was commenced. In 2004, Kun did not confront Fulop about their business relationship. Nor did she seek K-1's, corporate tax information or other participation in the corporation. That is wholly inconsistent with a party who truly believes herself to be an equal shareholder.

The fact that Kun was designated as a Vice President or an owner for banking and other business purposes is insufficient to demonstrate an equitable interest in Bucked Tooth. The designation of a corporate officer for convenience cannot be converted into shareholder or equity status without proof of an enforceable agreement to establish such a relationship.

In the absence of proof of an agreement to satisfy BCL §504, the credible evidence does not support Kun's claim for stock ownership in Bucked Tooth. Thus, her claim to inspect the corporate books and records pursuant to BCL §624 must fail as moot.

It is clear that, even though Kun is not a shareholder in Bucked Tooth, she does have an ownership interest in the dental equipment obtained by the parties as "owners" as well as supplies purchased during the pendency of the action. In addition, she remains a tenant conducting her dental practice in the office. Thus, counsel and the parties are directed to appear for a conference to address such issues on November 7, 2008 at 9:30 a.m.

In the meantime, the parties shall continue to pay rent and the equipment leases

Kun v. Fulop, et ano.
Index No. 3709/07

on an equal basis with equal access thereto until further order of this Court.

Settle judgment on ten days notice.

Dated: Mineola, NY
October 7, 2008

A handwritten signature in black ink, appearing to read 'L. B. Austin', written over a horizontal line.

Hon. Leonard B. Austin, J.S.C.