

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17  
Justice

	<u>x</u>	Index
JOANNA (a/k/a NANA) LOISELLE, etc., et al.		Number <u>2778</u> 2006
		Motion
- against -		Date <u>July 9,</u> 2008
IOANNIS (a/k/a JOHN) VAGIANDERIS, etc.		Motion
		Cal. Number <u>31</u>
	<u>x</u>	Motion Seq. No. <u>6</u>

The following papers numbered 1 to 16 read on this motion by the plaintiffs for an award of partial summary judgment in their favor on the first cause of action asserted in their amended complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-6
Answering Affidavits - Exhibits .....	7-9
Reply Affidavits .....	10-15
Other .....	16

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action for specific performance of an option to purchase the defendant's interest in a closely held corporation pursuant to a shareholder's agreement.

In January 2001, plaintiff Joanna Loisel and Aristotelis Vagianderis, now deceased, formed Kalamaki Taverna, Inc. (the corporation) and entered into a written shareholder's agreement setting forth various rights and obligations of the corporation and its principals. Pursuant to the shareholder's agreement, dated February 19, 2001, Loisel and Vagianderis were each 50% shareholders in the corporation. Aristotelis Vagianderis died on March 7, 2006. Prior to his death, Vagianderis commenced a proceeding (bearing Queens County Index Number 307/06) for a

judicial dissolution of the corporation, pursuant to BCL § 1104, based upon a deadlock between him and Loiselle with respect to all aspects of the corporation. After Vagianderis' death, Loiselle commenced the present action against Vagianderis' estate on her own behalf and derivatively, on behalf of the corporation, to enforce a buy-out provision in the shareholder's agreement.

The amended complaint alleges, inter alia, that due to Vagianderis' death on March 7, 2006, he was automatically divested of his interest in the corporation and his legal standing to dissolve the corporation was extinguished as per the terms of the shareholder's agreement. It also alleges that the corporation is entitled to buy out the decedent's shares and continue the business of the corporation because Loiselle timely informed the decedent's representative in accordance with the shareholder's agreement that she was electing to do so. As a result, the first cause of action asserted in the amended complaint seeks a mandatory buy-out of the decedent's 50% interest in the corporation due to his death.

The plaintiffs move herein for an award of partial summary judgment in their favor on their first cause of action seeking to enforce the buy-out provision of the shareholder's agreement. The defendant estate opposes summary judgment and argues that the subject buy-out provision may not be invoked because there is a pending dissolution proceeding that was commenced prior to the decedent's death.

The summary judgment proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). The failure to make such a showing requires a denial of the motion (Winegrad v New York Univ. Med. Center, 64 NY2d 851 [1985], supra). However, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish a triable issue of fact (Zuckerman v City of New York, 49 NY2d 557 [1980], supra).

In support of summary judgment the plaintiff submits, inter alia, copies of the subject shareholder's agreement and the plaintiffs' notice of election to purchase the decedent's shares of stock. The shareholder's agreement states, in relevant part, as follows:

In the event of the death of a stockholder, the Corporation business may be continued by the surviving parties on giving notice of such election to continue to the legal representative of said deceased party within thirty (30) days following the death of such deceased party. The deceased party's interest in the Corporation shall terminate on the date of his or her death and the value of the interest of such deceased party in the Corporation shall be determined as of the date of said deceased party's death. The interest so determined shall be paid to his or her legal representative. . .

The shareholder's agreement submitted herein explicitly provides that the decedent's interest in the corporation was terminated as of the date of his death. The evidence submitted also demonstrates that, upon his death, the plaintiffs gave timely notice of the intent to redeem the decedent's shares of stock and thereby exercised the right to purchase his interest in accordance with the shareholder's agreement. Since the decedent is no longer the holder of an interest in the corporation, the plaintiffs' right to acquire the decedent's shares in the corporation and continue the corporation prevails (see Heseck v 245 South Main Street, 170 AD2d 956 [1991]). Contrary to the defendant's contention, and under the circumstances presented, that right is neither pre-empted nor abrogated by the pending judicial dissolution proceeding (cf. Matter of Penepent Corp., 96 NY2d 186 [2001]).

Based upon the foregoing, the plaintiffs have demonstrated an entitlement to an award of partial summary judgment on their first cause of action for a mandatory buy-out of the decedent's 50% interest in the corporation. The defendant fails to raise a triable issue of fact.

Accordingly, the plaintiffs are awarded partial summary judgment in their favor on the first cause of action asserted in the amended complaint.

The defendant is ordered to adhere to the buy-out provisions of the shareholder's agreement. The provisions of the shareholder's agreement regarding the valuation of the corporate stock shall also be followed.

Dated: October 14, 2008

---

J.S.C.