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Varveris v Zacharakos
2012 NY Slip Op 50947(U)
Decided on May 24, 2012
Supreme Court, Kings County
Schmidt, J.
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Decided on May 24, 2012

Supreme Court, Kings County

<p>Chris Varveris, Plaintiff,</p> <p>against</p> <p>James Zacharakos, et. ano., Defendants.</p>
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17584/2010

Plaintiff Attorney: Ruskin Moscou Faltischek, PC 1425 RXR Plaza, Uniondale, NY 11556

Fine & Hallock, LLP, 334 Deer Park Avenue, Babylon, NY 11702

Defendant Attorney: Damian J. Pietanza, 7703 5th Avenue, Brooklyn, NY 11209

David Schmidt, J.

Upon the foregoing papers, defendant James Zacharakos cross-moves^[FN1] for an

order, pursuant to CPLR 3211 (a)(5) & (7) and CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Chris Varveris as barred by the statute of frauds and for failure to state a cause of action. [*2]

Plaintiff, a shareholder in a closely held corporation, commenced this action for breach of fiduciary duty, conversion, injunction and constructive trust based upon the purchase of the shares of a departing shareholder by defendant Zacharakos, the president of the corporation and defendant Andrew Sichenze, a fellow shareholder of the corporation, without defendants' providing plaintiff with an opportunity to participate in the transaction. The closely held corporation at issue, Jarc Realty Company, Inc. (Jarc) was incorporated in September 1986 for the purpose of acquiring a residential apartment building at 902 72nd Street in Brooklyn. Upon incorporation, 200 shares were issued and distributed equally among four shareholders— plaintiff, Zacharakos, Sichenze and Rolf Kristiansen. In January 1999, Zacharakos transferred his 50 shares in Jarc to his wife, Helen Zacharakos, but retained the title of president of Jarc.

On or about March 26, 2010, Kristiansen agreed to sell his 25% interest in Jarc (50 shares) to Zacharakos for the sum of \$350,000.00. At some point thereafter, it was agreed that Zacharakos would purchase two-thirds of Kristiansen's shares and Sichenze would purchase the other one-third. Plaintiff commenced the instant action on July 16, 2010, claiming in essence that, as one of three remaining shareholders of Jarc following the departure of Kristiansen, he should be entitled to purchase one-third of the shares offered by Kristiansen (16 2/3 shares total). On August 2, 2010, Zacharakos filed an answer wherein he asserted affirmative defenses that the complaint fails to state a cause of action and is barred by the statute of frauds. On November 12, 2010, Zacharakos brought the instant cross motion for summary judgment upon the same grounds.

In support of his cross motion for summary judgment, Zacharakos submits an affidavit wherein he states that, to his knowledge, there was no shareholder's agreement for Jarc or any corporate document restricting the sale of shares. Zacharakos states that he "informed [plaintiff] and Sichenze" of his agreement with Kristiansen and that Sichenze requested that he purchase one-third of the shares. Zacharakos asserts that he agreed to Sichenze's request and paid to Kristiansen \$233,333.33, representing two-thirds of the \$350,000.00 purchase price. Zacharakos states that Sichenze presumably paid Kristiansen the remaining \$116,666.66. Zacharakos avers that "[a]t no time did [plaintiff] ever request to participate in

the purchase" of Kristiansen's shares.

Plaintiff concedes that he had no agreement with either Kristiansen or Zacharakos regarding the purchase of the subject shares. As such, the statute of frauds defense of Zacharakos is not relevant to the instant action. The essential issue presented is whether Zacharakos breached a fiduciary duty to plaintiff, as a shareholder of Jarc, as the managing [*3]agent of Jarc^[FN2] or as the president of Jarc, when plaintiff was denied the opportunity to purchase one-third of the Kristiansen shares.

In his affidavit in opposition, dated December 7, 2010, plaintiff alleges that Zacharakos informed him that Kristiansen was selling his shares, that the price for one-third of the shares would be \$150,000, that plaintiff should have available \$62,000 in ready funds and that plaintiff could pay the balance of the purchase price under a note to Kristiansen. Plaintiff maintains that he told Zacharakos he would have the funds by the end of the day and that he would "wait to hear from" Zacharakos. Plaintiff states that Zacharakos never called him back. Plaintiff subsequently learned of Sichenze's purchase of one-third of the Kristiansen shares.

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*Rut v Young Adult Institute, Inc.*, 74 AD3d 776 [2010]). It is true that directors of a corporation owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly (see *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684-685 [2011]). However, even assuming that Zacharakos owed a fiduciary duty to plaintiff as a fellow shareholder, corporate officer or agent of the corporation, there is no showing that Zacharakos' purchase of Kristiansen's shares or Zacharakos' allowing Sichenze to partake in the transaction without making an offer to plaintiff amounts to fiduciary "misconduct."

In this matter, there is no evidence or allegation of restrictions on the disposition of shares in the corporate documents. As such, Kristiansen had the right to sell to Zacharakos, Sichenze or to any other person of his choosing (see *Cohen v LeNoble*, 50 AD3d 321 [2008]; *Borden v Guthrie*, 23 AD2d 313, 319 [1965], *affd* 17 NY2d 571 [1966]; *Leviton Mfg. Co. v Blumberg*, 242 AD2d 205, 207-208 [1997]). A corporation is held to have no interest in its outstanding stock or in dealings in its shares among its stockholders (see *Hauben v Morris*,

255 App Div 35, 46 [1938]; *Mannheimer v Keehn*, 30 Misc 2d 584, 595 [1943]), and thus "[t]here is no ordinary prohibition against the personal purchase by a director of the stock of his corporation, at least as far as the corporation is concerned" (*Lewin v New York Ambassador*, 61 NYS2d 492, 495 [1946]). There is no allegation that the transaction reduced the number or value of plaintiff's shares, that the transaction injured the corporation in any respect or that the transaction was tainted with fraud or illegality. Significantly, plaintiff concedes that there does not appear to be any controlling authority directly on point with regard to whether the duty owed by a shareholder to other shareholders extends to a requirement to offer equal participation in the purchase of shares of a departing shareholder. Despite the contention of plaintiff, this court does not find that the subject transaction is analogous to a board of directors issuing stock options or treasury shares to themselves without granting the opportunity to other shareholders to purchase those shares on the same terms (*Goldberg v Goldberg*, 139 AD2d 695 [1988]; *Hammer v Werner*, 239 App Div 38 [1933]). Zacharakos and Sichenze did not purchase treasury shares owned by the corporation, but rather purchased shares owned privately by an [*4] individual shareholder. As the Kristiansen shares were not owned by the corporation, plaintiff did not have a beneficial interest in those shares by virtue of his status as shareholder of the corporation. Rather, the shares were owned entirely by a private individual who was free to sell and agreed to sell them to certain individuals of his choosing. There is no evidence or allegation that Kristensen was seeking to sell the shares back to the corporation for the benefit of all shareholders, had any intent to transfer a portion of the shares to plaintiff or believed that Zacharakos would subsequently deliver any shares to plaintiff following the sale. Under these circumstances, the court finds as a matter of law that there was no breach of fiduciary duty to plaintiff, or that plaintiff is otherwise entitled to any portion of the shares purchased by defendants in their private transaction with Kristiansen (*cf. Blank v Blank*, 256 AD2d 688 [1998][majority shareholder and officer of corporation breached fiduciary duty to other shareholders by modifying agreement for purchase of retiring stockholder's 20% interest in corporation, to provide that shares would be purchased not by corporation but by himself]). Plaintiff has failed to raise an issue of fact to preclude a grant of summary judgment.

As a result, Zacharakos' cross motion for summary judgment is granted.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: The main motion by plaintiff to compel discovery from defendants was resolved by order dated February 15, 2011.

Footnote 2: Following its purchase by Jarc in 1986, the property was managed by Zacharakos' company, Jalen Management Company (Jalen). According to the affidavit of Zacharakos' daughter, Paula, dated January 4, 2011, in addition to other documents, sole ownership and control of Jalen was transferred to Paula in 2001.

[[Return to Decision List](#)]