

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2  
Justice

THE ESTATE OF ANNA K. ESSIG, x  
LEROY J. ESSIG, as Executor and  
LEROY J. ESSIG, as Individual,  
  
Plaintiffs,

Index  
Number 8393 2005  
  
Motion  
Date November 15, 2006

-against-

5670 58 STREET HOLDING CORP.,  
LORRAINE ANGELILLO, SANDRA  
VAICHUNAS and P.M. GAETA,  
  
Defendants.  
x

Motion  
Cal. Number 12

The following papers numbered 1 to 19 read on this motion by plaintiffs for order granting summary judgment and declaring that they are the owners of 225 or 75% of the shares of corporate stock and permitting the shares designated in Anna Essig's will to be distributed, and for an order directing the defendants to file all tax returns and take all steps necessary to reinstate the corporation. Defendants cross-move in opposition and seek an order pursuant to CPLR 3124 compelling plaintiffs to produce the documents previously demanded by defendants.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits (1-8, 1-3)..	1-4
Opposing Affirmation-Exhibit.....	5-7
Notice of Cross Motion-Affirmation-Affidavit- Exhibits (A-P).....	8-16
Reply Affirmation-Exhibit (1-5).....	17-19

Upon the foregoing papers it is ordered that this motion and cross motion are decided as follows:

Plaintiffs move for summary judgment and a declaration that they are the owners of 225 or 75% of the shares of corporate stock and permitting the shares designated in Anna Essig's will to be

distributed, and an order directing the defendants to file all tax returns and take all steps necessary to reinstate the corporation.

The court notes that although plaintiff demands judgment as against all of the defendants, and Mr. Gaeta, the corporation's accountant, is named in the caption of the amended verified complaint, no cause of action has been stated against this defendant.

Defendants cross-move in opposition, and assert that Leroy Essig, Vaichunas and Angelillo are equal shareholders of the corporation, each owning a one-third interest, or 100 shares apiece, in the corporation. Defendants assert that plaintiffs motion should be denied as they have failed to establish entitlement to judgment as a matter of law and upon the grounds stated in CPLR 3212(f). Defendants cross-move to compel plaintiffs to comply with a discovery demand served on December 27, 2005, following Mr. Essig's deposition, in which they sought the production of all prior wills of Anna Essig, all trust agreements prepared by or for her, whether or not executed or funded, and all agreements between Leroy Essig and the corporation.

Defendants' cross-motion to compel plaintiffs to comply with their December 27, 2005 discovery demand is denied. Defendants' cross-motion to compel was served ten months after the discovery demand was first served and five months after the note of issue was filed on May 1, 2006 and only after plaintiffs moved for summary judgment. Furthermore, defendants' speculation regarding the possible contents of any prior wills of Anna Essig, unexecuted or unfunded trust agreements, or unspecified agreements between Mr. Essig and the corporation, is insufficient to establish the existence of a genuine issue of fact or to establish that facts essential to justify opposition exist, which warrant the denial of the within motion for summary judgment.

Turning now to plaintiffs' motion, the court finds that the documentary evidence establishes that real property located at 5670 58th Street, Queens, New York was acquired by Anna Essig from Guaranteed Title and Mortgage Company, for the sum of \$1.00, pursuant to a deed dated November 13, 1945. No further evidence has been presented by the parties as to this transaction. Therefore, any claim by defendants that the property may have been owned at one time by a family member, including Anna Essig's father, is irrelevant, as there is no evidence that Anna's siblings were ever the co-owners of said real property or that it was improperly acquired by Anna Essig.

5670 58th Street Holding Corp. (the corporation) was incorporated on April 15, 1946 in order to manage and maintain real property. Anna Essig transferred title to said real property to the corporation, pursuant to a deed dated January 19, 1948. The corporation was originally authorized to issue 200 shares of common stock. On April 1, 1948, stock certificate No. 2 for 150 shares in the corporation was issued to Anna Essig. On April 1, 1948, 50 shares of stock were issued to Adele Klashus. The Certificate of Incorporation was amended in 1948 in order to increase the number of shares of stock from 200 to 500, although it appears that only 300 shares of stock were ever issued. On July 7, 1948, 75 additional shares of stock in the corporation were issued to Anna Essig. On July 7, 1948, 25 additional shares of stock in the corporation were issued to Adele Klashus.

Anna Essig was the President and Treasurer of the corporation, and her sister Adele Klashus was its Secretary from 1948 until her death in 1994. It is undisputed that there was no shareholders agreement, or any other document pertaining to the formation of the corporation, and that the original corporate officers, Anna Essig and Adele Klashus, did not hold board of director or shareholder meetings, conduct annual elections of officers and directors, maintain regular minutes of corporate functions, or maintain a stock ledger.

John Klashus, Anna and Adele's brother, was not a corporate officer, and it is undisputed that no shares of stock were issued to him at any time. Anna, Adele and John each received a salary from the corporation, and John Klashus resided in an apartment in the corporate property during his lifetime, but did not pay rent to the corporation. After Adele died in 1994 her daughter Sandra Vaichunas assumed her mother's duties as secretary and presently receives a salary of \$600.00 a month. John Klashus died in 2000, at the age of 94 and is survived by his daughter Lorraine Angelillo. Lorraine Angelillo testified that she is employed by the corporation and receives a salary of \$2,500.00 a month.

The corporation was dissolved in 1995 by proclamation of the Secretary of State pursuant to Tax Law § 203-a, for the failure to file taxes returns since 1991. However, it is asserted that Anna Essig and Leroy Essig were unaware of the dissolution until 2004, and a demand was made on the corporation's attorney and accountant on July 14, 2004 to reinstate the corporation. To date the corporation has not been reinstated, although the parties agree that reinstatement is warranted.

Anna Essig died on October 6, 2004, and is survived by her son Leroy Essig. Anna Essig's will, dated February 6, 2001, states in Article II, that "I currently own 225 shares or a seventy-five percent (75%) interest in a family-owned corporation by the name of 5670 58th Street Holding Corporation which owns certain real estate and improvements thereon. I wish to bequeath said stock as follows: A. I bequeath 50 shares in the 5670 58th Street Holding Corporation to my niece **LORRAINE KLASHUS ANGELILLO** (sic), if she survives me. B. I bequeath 24 shares in the 5670 58th Street Holding Corporation to **SANDRA VAICHUNAS**, if she survives me. C. I bequeath 25 shares to my daughter-in-law, **ANN C. ESSIG**, if she survives me."

Mrs. Essig left specific monetary bequests to three churches or religious institutes. Article III of the will provides that the residuary estate is to be given to her son, Leroy J. Essig, or his issue if he failed to survive her. At the time of Anna Essig's death, her stock certificates for the corporation were found among her personal possessions. Leroy Essig's wife, Ann C. Essig was struck by a car and died on August 24, 2004. Therefore, the 25 shares of stock bequeathed to Ann C. Essig became part of the residuary estate of Anna Essig.

It is well settled that the issuance of a certificate for shares is not necessary to create the status of shareholder. It is merely evidence thereof. (See Walsh v Somerset Group, Inc., 45 AD2d 915 [1974]; see also In re M. Kraus, Inc., 229 AD2d 347 [1996]); see also In re Zarnin, 89 NY2d 916 [1996]). A person or entity that has properly purchased stock in a corporation has a continuous right to the issuance of a stock certificate (see BCL §§ 504, 508).

Here, the documentary evidence and the parties' deposition testimony establish that the corporation came into existence on April 15, 1946 and that stock certificates were issued on April 1, 1948 and July 7, 1948 to Anna Essig totaling 225 shares, and to Adele Klashus totaling 75 shares. Although Anna Essig may have sought to transfer 75 shares of stock to her son Leroy Essig on December 7, 1963, and the name of Adele Klashus was affixed as the transfer agent, no new stock certificates were issued reflecting a corresponding reduction in the number of shares of stock Anna Essig owned in the corporation.

Defendants' claim that the stock certificates issued to Anna Essig may not be genuine, or that they may have been forged, is purely speculative. Defendants acknowledge that the stock certificate forms issued to Mrs. Essig were in existence prior to 1948, and that Adele Klashus' signature appears on these stock

certificates. It is noted that the defendants have not submitted an affidavit from a handwriting expert in support of their claim of forgery. The court further finds that the so called corporate "minutes" presented by Ms. Vaichunas, are, as she states, of no evidentiary value, and therefore will not be considered by the court for any purpose.

There is no evidence that Adele Klashus purchased, or acquired in any other manner any additional shares of stock after the issuance of the 75 shares of stock in 1948. There is no evidence that any shares of stock were ever issued to John Klashus or placed in a trust for either his benefit, or for the benefit of his daughter, Lorraine Angelillo. Rather, the evidence presented establishes that John Klashus performed a variety of jobs on behalf of the corporation, such as engaging in agreements to rent out certain space, perform repairs, collect rent, and obtain permits, all of which is consistent with that of a managing agent or an employee, rather than that of a shareholder of the corporation. The court finds that Lorraine Angelillo's claim that her aunt Anna Essig was "holding" her father's share for him, and that she would be taken care of, is insufficient to establish the existence of either a trust agreement, or that she or her father was a shareholder or one-third owner of the corporation. Finally, Ms. Vaichunas present claim that her grandmother was also a shareholder of the corporation is wholly unsubstantiated.

Ms. Vaichunas and Ms. Angelillo, in opposition to the motion for summary judgment and in support of their counterclaim for declaratory judgment, rely upon statements allegedly made to them by deceased family members, including their aunt, Anna Essig. CPLR 4519, known as the "Dead Man's Statute", precludes testimony about transactions or communications with a dead person on the part of a person with an adverse interest in the transaction or communication. The purpose of the statute is "to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court" (Matter of Wood's Estate, 52 NY2d 139, 144, [1981]; see also Phillips v Kantor & Co., 31 NY2d 307, 313, [1972].) Thus, when death "seals the lips of one of the parties to a transaction, the Dead Man's Statute seeks to achieve adversarial balance in civil trials by sealing the lips of the surviving party" (Alexander, Practice Commentaries, McKinney's Cons laws of NY, Book 7B, CPLR C4519:1). Evidence precluded under the Dead Man's Statute may not be used to support a motion for summary judgment (Beyer v Melgar, 16 AD3d 532 [2005]; Friedman v Sills, 112 AD2d 343, 344-45, [1985]; cf. Phillips v Joseph Cantor & Co., supra).

Defendants Vaichunas and Angelillo are both "interested" in the outcome of the case within the meaning of the Dead Man's Statute (see Smith v Kuhn, 221 AD2d 620, 621 [1995]) and seek to offer hearsay statements allegedly made by Anna Essig in opposition to plaintiffs' motion for summary judgment (see Phillips v Cantor & Co., *supra*; Williams v Ross, 277 AD2d 776, 778 [2000].) "Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted" (Arnold v New York City Hous. Auth., 296 AD2d 355, 356 [2002]; see Phillips v Cantor & Co., *supra*; Johnson v Pollack, 261 AD2d 585 [1999]). Defendants' claim that the siblings Anna, Adele and John were each one-third owners of the corporation, and that Sandra Vaichunas and Lorraine Angelillo, along with plaintiff Leroy Essig, succeeded to their parents' interest, is based solely upon hearsay evidence. Since defendants have offered no other evidence to support their claim, they have failed to present admissible evidence sufficient to raise a triable issue of fact. Plaintiffs, therefore, are entitled to summary judgment on the first cause of action (see generally Rodriguez v Sixth President, Inc., 4 AD3d 406, 407 [2004]). The court further finds that as no basis exists for the imposition of a constructive trust, defendants' counterclaim must be dismissed.

Turning now to plaintiffs' second cause of action to reinstate the corporation, it is well settled that statutory dissolution by proclamation of the Secretary of State pursuant to Tax Law § 203-a is intended to encourage voluntary payment of franchise taxes (see Lorisa Capital Corp. v Gallo, 119 AD2d 99; Bowditch v 57 Laight St. Corp., 111 Misc 2d 255). A dissolved corporation "may sue or be sued ... in its corporate name, and process may be served by or upon it" (Business Corporation Law § 1006[a][4]; see Gutman v Club Mediterranee Int., 218 AD2d 640). However, while a corporate dissolution may not affect the corporation's right to carry on business for the purpose of winding up its affairs, new business is prohibited absent reinstatement by payment of back taxes (see Tax Law 203-a; Business Corporation Law § 1005[a][1]; Metered Appliances v 75 Owners Corp., 225 AD2d 338; Lorisa Capital Corp. v Gallo, *supra*). Here, it is undisputed that the corporation was dissolved in 1991 for the failure to file tax returns. However, as the parties seek to reinstate the corporation, plaintiffs' request for summary judgment on the second cause of action, is granted to the extent indicated below.

In view of the foregoing, plaintiffs' motion for summary judgment on the first cause of action for declaratory relief is granted and it is the declaration of the court that the Estate of Anna Essig is the owner of 225 or 75% of the shares of corporate stock.

That branch of plaintiff's motion which seeks summary judgment on the second cause of action is granted to the extent that the plaintiffs, the defendant corporation, shareholders and corporate officers including defendant Sandra Vaichunas, are directed to take all necessary steps for the reinstatement of the corporation, in accordance with Tax Law § 203-a(7). Since Lorraine Angelillo is neither a director, officer or shareholder of the corporation, her consent to said reinstatement is neither necessary nor required.

Defendants' counterclaim for declaratory judgment and for the imposition of a constructive trust is dismissed, and it is the declaration of the court that the defendants are not each the owner of 100 shares or a one-third interest in the defendant corporation. (CPLR 32132[b]).

Dated: January 25, 2007

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J.S.C.