01/10/69 RICHARD A. HOROWITZ AND POOLE'S LTD. v.

1969 | Cited 0 times | Court of Chancery of Delaware | January 10, 1969

MARVEL, Vice Chancellor

UNREPORTED DECISION

This is an action for specific performance [1] of an alleged agreement for the sale to the plaintiff Poole's Ltd. of fifty shares of stock of such corporation owned by the defendants Mr. and Mrs. Irving Berman, the same being all of the issued and outstanding shares of Poole's other than the same number of shares owned by the plaintiff Richard A. Horowitz. The corporation in question has been principally engaged in the business of importing alcoholic beverages from Europe and selling them by mail, thereby avoiding local sales and other state taxes. The name Poole's, however, has been used in the past by others in connection with the marketing of duty-free liquor, and as a result of fair dealing with customers on the part of those engaged in such business, a substantial pool of good will was built up. Poole's Ltd. was incorporated in 1966 and deals solely in duty-paid liquor. Since 1966, by far the largest market for Poole's Ltd.'s imported wines and spirits has been the metropolitan New York area. Poole's imports its product from wholesale warehouses in Antwerp, Belgium, and ships to its customers from its own warehouse in New Jersey. Orders are received and filled by a second corporation, Central Date Expediters, Inc., the stock of which is also held in equal shares by Mr. Horowitz and the Bermans. Poole's has compensated Central Data for its services by paying it $2.00 per gallon shipped plus an annual fee of $10,000. The plaintiff Richard Horowitz has performed the duties of preparing Poole's advertising brochures, has dealt with customs problems, Freight and supplies, and has concerned himself with public relations. The defendant Irving Berman has supervised an office force of five clerks, and his basic responsibility is seeing to it that the paper work required for filling customers' orders is properly taken care of. The business the prospered. In 1967, Horowitz and Berman each drew down $95,000 as informal dividends, the success of this unusual business being attributable to the joining together of the idea of using the mails to avoid state liquor taxes with the use of a selective mailing list of prospective customers. However, such enterprise operates constantly under a cloud which could portend disaster, namely that the legislature of the State of New York, the state where 90 to 95% of Poole's business is done, will enact legislation eliminating the tax avoidance aspect of Poole's business, thereby virtually putting it out of business. Ten such bills were introduced in the New York legislature in the early part of 1968. However, none passed.

Because of such threat to the future of Poole's Mr. Horowitz, in the early part of 1967, with the knowledge and consent of Mr. Berman, organized his own corporation known as International Purchasing Agents, Inc., for the purpose of offering Poole's customers modestly priced foreign

imports other than intoxicating beverages, thereby creating a hedge against the threatened loss of such latter business. Brochures for this new company were mailed out in the same envelopes with those of Poole's, and the defendant Berman was not only aware of such use of Poole's name by Mr. Horowitz corporation in such project, but agreed orally to such arrangement. Berman was originally paid $10,000 per thousand names used by Horowitz' International Purchasing from the Poole's list of customers, an arrangement which was changed from time to time to take into consideration Berman's equity in Poole's as Horowitz expanded the operation of his wholly owned corporation.

The threat of legislation in New York adverse to Poole's interests having by 1968 become critical, Horowitz proposed to Berman in March of 1968 that one rather than two brochures be prepared for mailing and that such mailing be made in conjunction with the use of lists of other mail-order companies with the purpose in mind of opening up new channels of business, at the same time capitalizing on last-minute liquor purchases at a cost to Poole's of only $2.00 per gallon in liquor sold to buyers on other lists. Another factor taken into consideration, in advancing the proposal for such a mailing, was that the period after the April 15 tax filing date has traditionally been a good time for Poole's to do business. The long run purpose in Horowitz' mind, as noted above, would seem to have been to establish a market for imports other than Poole's vulnerable commodity, liquor. Berman, although having consented in the past to joint mailing of separate brochures, demurred to Horowitz' revised planned course of action, and, after conferring with his accountant, Tarlow, who was also a member of the bar, declined to approve Horowitz' draft of a formal contract designed to give Horowitz' own company a clear right to use the name Poole's in connection with the importing of foreign merchandise other than alcoholic beverages. Berman had, at this point, reached the Conclusion that a number of the non-alcoholic imports being [*] by Horowitz' own company were shoddy and that their [*] with the name of Poole's, which stood for the delivery of cheap, good quality intoxicating beverages, was seriously damaging Poole's good name. At this point, Horowitz took the apparently arbitrary position that, regardless of their joint interests, he had the unilateral right to use the name Poole's for his own purposes and that if Berman would not agree to such proposed use, that he would seek the appointment of a Delaware receiver for Poole's Ltd. on the ground of management deadlock. Realizing that Horowitz meant business, Berman, at this point, namely about April 1, 1968, engaged the services of Irving Morris, a practicing New Jersey attorney. On April 3, Mr. Horowitz and Mr. Berman met in the presence of the former's attorney, Charles Gross, and the latter's attorney, Mr. Morris. After Discussion of a possible receivership, Mr. Morris suggested as an alternative that there be a buy-sell arrangement, a plan which Mr. Horowitz assented to on condition that he be the buyer. In the meantime, however, namely on March 27, 1968, Horowitz, [*] Berman's knowledge, had formed a new corporation known as [*] International Purchasing Club and had taken steps to arrange for a customer mailing for the benefit of such corporation. Significantly, such arrangement appears to antedate Discussions as to a buying out of Mr. Berman's interest. On April 4, Horowitz and Berman met for lunch, and Berman again refused to sign a proffered contract, which, if executed, would have constituted an admission on Berman's part that International Purchasing Agents, Inc. had the right to use the name Poole's. Berman, for his part, announced that he was arranging for an overdue mailing for Poole's Ltd. itself so as to reap the harvest of the traditional

post-tax filing business. However, when Berman sought to make such an arrangement with the corporation's printer, Direct Mail Printing Company, through its chief executive, Mr. Goldberg, Horowitz was able to cancel the order by purporting to read a fictitious letter purportedly of his attorney's, Mr. Gross, to the effect that Poole's Ltd. was about to go into the hands of a receiver. Meanwhile, however, plans for a buy-sell arrangement were worked on by the attorneys, Mr. Morris and Mr. Gross, each preparing a draft of such an agreement. Finally, on May 2, 1968, Mr. Horowitz and Mr. Berman met in a special conference room in company with their attorneys in the office building where Mr. Morris' offices were located. After an all day [*] the principals and their attorneys descended to Mr. Morris' office where both Mr. Horowitz and Mr. Berman signed several copies of a document dictated by their attorneys entitled "* * * Memorandum Notes Respecting Agreement Arrived At On May 2, 1968 * * * To Be Incorporated Into Formal Agreement * * *". [2] The basic matters purportedly agreed upon were Horoitz' purchase of the Bermans' Central Data stock, and Poole's Ltd's purchase of the Bermans' Poole's stock, together with a division of corporate assets.

Paragraph 14 of the memorandum provides: "* * * The formal agreement is to be drawn by Irving Morris and shall include the clauses appearing in draft prepared by him and Mr. Gross which are not inconsistent with any of the provisions of this memorandum * * *".

The plaintiff Horowitz contends that the document in question, when read with an unexecuted formal document attached to the complaint, which he terms the Horowitz-Morris draft, meets all of the tests required for determining the existence of a contract. He goes on to argue that the fact that details such as the division of assets after the accountants had brought records up to date, formal recognition of the right admittedly acceded Mr. Berman to engage in the retail liquor business in the future, and arrangements for insuring Mr. Horowitz' life so as to guarantee his promised payments, were left for the future, does not vitiate the enforceability of the matters agreed upon. Counsel for Mr. Horowitz stresses the fact that for sometime prior to the May meeting the basic terms of a purchase and sale arrangement had been worked out, namely an agreement that $240,000 would be paid by Mr. Horowitz for the stock held by the Bermans in Poole's Ltd. and Central Data Expediters and that Mr. Berman would also receive half of the net worth of both companies as of April 1, 1968, the amount of $240,000 being based on an estimated $90,000 earnings per year of the business which could be expected to be received by Berman over a three year pay-out period. It is therefor contended that all essential terms of such basic agreement, having been agreed to in April, except for how the tax burdens involved in the transaction were to be divided, such terms were made fast by the execution of the May 2 memorandum read with its reference to an earlier draft.

The validity of such alleged contract is, of course, to be tested under New Jersey law, Comerata v. Chaumont, 52 N.J.Supp. 299, 145 A.2d 471. It is conceded, however, that a finding of a manifested intent to be bound is essential to a determination that an enforceable contract has been made preliminary to the drawing up of a formal all-inclusive document, I Williston on Contracts (1957 ed.) § 21. Plaintiffs contend that such a contractual intent is established by the evidence.

Defendants counter by detailing not only what they characterize as acts of deception and/or undue pressure on a fellow stockholder on the part of Mr. Horowitz leading up to the execution of the May 2 memorandum (viz., agreeing to a $6,000 withdrawal by Berman on April 26 when over $60,000 was apparently available, and unilaterally drawing out $45,000 from the business for himself on April 30) [3] but by pointing out specific areas as to which no agreement had allegedly been reached as of the evening of May 2 and the testimony that Berman had insisted on May 2 that any form of agreement would not be made by him until the accounting data was approved.

First of all, in light of the surrounding facts and circumstances, namely the pre-May 2 existence of not only a Gross draft of a proposed contract but also of a Morris draft and the further fact that on the morning following the May 2 meeting Mr. Morris went to work on a draft of a final agreement which was not merely to incorporate the consistent provisions of the Gross draft alone (which draft bore a back setting forth Mr. Gross' firm name) but was to include as well his own work, I conclude that the word "draft" in paragraph 14 of the May 2 memorandum was intended to be "drafts". Consequently, the the incorporation by reference directed by paragraph 14 of the May 2, 1968 memorandum must refer to those clauses appearing in both the Gross and Morris drafts which are not inconsistent with any of the provisions of the memorandum. When the memorandum is so read, as I am convinced that it must be, a number of ambiguities arise. For instance, the May 2 memorandum provided that Horowitz' purchase of the Bermans' Central Data stock for $30,000 was to extend over a twelve month period with payments of $2,500 per month "* * * subject to being terminated in the event that the legislature of the State of New York enacts legislation which will effectively put Central Data out of business * * *". The memorandum then goes on to provide that in the event of such New York legislation "* * * there is no obligation on the part of Richard A. Horowitz to acquire the stock of Central Data Expediters, Inc. * * *". Defendants claim that this arrangement failed to make provision for what would happen to the stock and payments on account in the event of New York legislation before completion of payment in full, and point out the fact that variations on what should happen in such event are found in Mr. Morris' drafts of May 3. (Plaintiffs' exhibits 11 through 14). Next, the May 2 memorandum did not resolve with finality how possible claims against either Poole's Ltd. or Central Data Expediters were to be resolved (a matter considered in one of the Morris drafts, plaintiffs' exhibit 12). Of greater significance, a third policy of insurance (in addition to the exchange of policies provided for in the Horowitz draft) to be taken out on the life of Horowitz for the purpose of insuring payments to Berman on Horowitz' death, while discussed on May 2, was not provided for in the memorandum of that date, there being no meeting to minds on the important question as to who would pay the premiums on such third policy. Finally, Discussions on May 2 as to possible diversions of liquor to other businesses was not dealt with categorically in the May 2 memorandum, a specific formula having been later drafted by Mr. Morris, as evidenced by plaintiffs' exhibits 12 and 14. Also dealt with in Mr. Morris' May 3 work on proposed contractual provisions was a clause to the effect that Horowitz would not acquire the Central Data stock until it was paid for in full. In the event of adverse legislation full payment is excused and Berman is to keep the stock and all prior payments. He also worked on treatment of contingent claims, Berman's right to be a retail liquor dealer, contractually binding Horowitz' other companies so as to insure stipulated

payments to Berman, Horowitz' liability in the event the sum of $150,000 was not paid by December 15, 1970, and the examination of books. Several other provisions worked on by Mr. Morris were terms designed to prevent gallonage diversions and the division of mailing lists in the event Horowitz should go out of the liquor business.

While the lack of certainty and completeness found here might not be fatal were this a suit for damages, where specific performance is sought such unique form of relief will not be granted where a complex contract such as the one here in issue is uncertain in critical parts, Heim v. Shore, 56 N.J.Super. 62 151 A.2d 556. See Looman Realty Corp. v. Broad Street National Bank, 74 N.J.Super. 71, 180 A.2d 524, certification denied, 37 N.J. 520 181 A.2d 782. This principle has been long recognized in Delaware equity practice, Goodwin v. Collins, 4 Eouston 28, aff'd 4 Houston 53, Todd v. Diamond State Iron Co., 8 Houston 372, and M.F. v. F. 40 Del. Ch. 17, 172 A.2d 274, although, of course, the more uncomplicated a proposed bargain is, the easier it is for a court of equity to act despite minor contractual omissions, Vol. 2, Restatement of Contracts § 370.

In the case at bar, however, in a transaction of considerable complexity not only were there omissions of critical provisions, as noted above, but there is also a lack of completeness and full agreement as to matters which were actually dealt with in the memorandum and drafts.

The granting of specific performance is a discretionary act, although such exercise of discretion must be judicial in nature. Here, I have found that the document sued upon did not constitute a final and complete agreement designed to buy out Mr. Berman's interest in Poole's Ltd. and Central Data, and at the same time adequately secure to him payment of the agreed on purchase price. Accordingly, plaintiffs are not, in my opinion, entitled to a decree of specific performance as prayed for.

In view of the Conclusions herein reached, it will be unnecessary to consider defendants' affirmative defenses to the effect that the plaintiff Horowitz comes into Court with unclean hands; that such plaintiff's conduct was in violation of Regulation 10b-5 of the Securities and Exchange Commission, and that provisions of the purported agreement of the parties concerning capital gains treatment of the transaction constituted a tax fraud, although it would appear clear, that defendants' reliance on a federal regulation is without foundation, Standard Power and Light v. Investment Associates, 29 Del. Ch. 593, 51 A.2d 572.

Finally, apart from what was left unfinished or in ambiguous form on May 2, the actions taken by the parties following May 2 point to the expectation of further negotiations. Mr. Morris, as noted, went to work on drafting, Mr. Berman reported for work and drew out $20,000, thereby matching what he thought was the total of Mr. Horowitz' April 30 withdrawal, [4] while Mr. Horowitz sought to negotiate further on the tax consequences of the transaction.

Turning to defendants' counterclaim, I conclude that in view of the withdrawal of funds from the business by Mr. Berman when he directed his attorney to break off negotiations, and the fact that

adequate injunctive relief was granted defendants in the early stages of this proceeding, I see no basis for defendants' demand for an accounting as prayed for in their counterclaim.

An appropriate order may be presented on notice.

1. Jurisdiction appears to be premised on the claimed inadequacy of a remedy at law, Mr. Horowitz and Mr. and Mrs. Berman being, as noted above, the sole stockholders of Poole's Ltd. Diamond State Iron Co. v. Todd, 6 Del. Ch. 163, 14 A. 27, aff'd 8 Houston at 397, and G. W. Baker Co. v. U.S. Fire, 11 Del. Ch. 387, 97 A. 813

2. Several corrections of the May 2 memorandum were made by pen and initialed, but the fact that both Berman and Horowitz signed on behalf of the Horowitz corporation, Poole's International Purchasing Club, apparently was not noticed. Furthermore, Mrs. Berman, a stockholder of Poole's Ltd. and Central Data, did not sign the memorandum.

3. It should be noted, however, that on April 4, without Horowitz' knowledge, Berman transferred $41,280 from Poole's to Central Data, and that he surreptitiously removed some seven gallons of warehoused liquor some time in April. Horowitz seeks to justify his pre May 2 withdrawals on the theory that he was to be the owner of the business as of April 1, 1968. On May 3, after Berman had learned of Horowitz' April 30 withdrawal of $20,000, on advise of counsel, he withdrew a similar amount.

4. Actually his April 30 withdrawals were $45,000.