Philadelphia Court of Common Pleas
Orphans' Court Division

Erskine Brewster Kingsbury Calderon, Intervivos Trust
1134 IV of 2013
Control No.135511
Control No. 132663

OPINION

Introduction

The petition filed by two children of decedent Erskine Brewster Kingsbury Caldron ("Erskine, Sr.") raises the issue of whether the President/CEO and the Corporate Secretary of Kingsbury, Inc. should be compelled to re-register to the petitioners 1,520 shares of Kingsbury, Inc. capital stock that had been transferred to the trustees of two trusts: the Erskine B.K. Calderon Marital Trust and Erskine B.K. Calderon Credit Shelter Trust. The petitioners claim that this stock should be re-registered to them as the lineal descendants of their deceased father based on a November 1, 1965 Option to Purchase Agreement/Restrictive Covenant with Kingsbury Machine Works, Inc. (hereinafter "November 1, 1965 Agreement"). For the reasons set forth below, the preliminary objections to this petition are GRANTED and the petition is dismissed with prejudice for failure to state a viable cause of action under Pa.R.C.P. 1028(a)(4). In addition, the petitioners failed to join indispensable parties. See Pa.R.C.P. 1028(a)(5).

Factual Background

At the time of his death, petitioners allege that their father, Erskine Sr., owned 1,520 shares of capital stock in Kingsbury, Inc.[1] Erskine Sr. died on August 16, 2008 in Clyde County, North Carolina. He had been married to Diana Calderon for 32 years and he resided at 626 Dundee Lane, Holmes Beach, Florida. The founder of the Kingsbury Company was the decedent's grandfather, Dr. Kingsbury, who had five children. On April 26, 1965, Erskine, Sr. received 100 shares of Kingsbury stock from the trustee of his mother Elisabeth's trust. On October 5, 1976, Erskine Sr. directed Kingsbury to register his 100 shares in the name of "Erskine B. Calderon Trustee U/D/T of Erskine B. Calderon dated 9/30/76." On January 23, 1992, Kingsbury reissued the 100 shares in the name of "Erskine B. Calderon" at his request.

[1] 8/30/13 Petition, ¶ 2.

Nearly three years later, on June 16, 1995, these 100 shares of stock split 4-1, so that Erskine Sr. owned 400 shares. Erskine shortly thereafter directed Kingsbury to register these 400 shares in the name of "Erskine B. K. Calderon, as Trustee of the Erskine B.K. Calderon Living Trust U/A dated 5/31/95." On December 31, 2001, these 400 shares split again 4-1, so that Erskine Sr. then owned 1600 shares. On December 6, 2005, Erskine Jr. gave 10 of these 1600 shares to Matthew Calderon and Wayne Calderon. Erskine Sr. retained 1,590 shares in the name of Erskine B. Calderon, as trustee of the Erskine B.K. Calderon Living Trust U/A 5/31/95." In March 2008, Erskine Sr. gave another 70 shares of stock to his sons Matthew Calderon and Wayne Calderon, leaving 1,520 shares in his name as trustee of the Erskine B. Calderon Living Trust.[2]

Following Erskine Sr.'s death, the respondents note, at the direction of Mrs. Calderon's attorney, decedent's 1,520 shares were divided and transferred on May 29, 2009 to two trusts identified in decedent's living trust: 581 shares were registered to Diana L Calderon as trustee of the Erskine B. K. Calderon Marital Trust (hereinafter "Marital Trust"); 939 shares were registered to Diana L. Calderon and Matthew Calderon as to Co-Trustees of the Erskine B.K. Calderon Credit Shelter Trust(hereinafter "Credit Shelter Trust"). On January 3, 2011, Kingsbury re-registered the stock at the request of Mrs. Calderon's attorney with 874 shares to be held by the trustees of the Credit Shelter Trust and 646 shares to be held by the trustee of the Marital Trust.[3]

The Petitioners failed to attach any of these trust documents to their petition, although the caption of their pleading is "Erskine Brewster Calderon, Intervivos Trust" and they acknowledge these facts in their answer without objection to the preliminary objections. Instead of these trust documents, the petitioners premise their claim to the shares of Kingsbury stock exclusively on a November 1, 1965 Agreement between Erskine B. Calderon as well as other holders of capital stock of Kingsbury Machine Works and Kingsbury Machine Works. An analysis of this document and of the record presented by petitioners clearly supports the conclusion that their petition is frivolous and without merit for failure to state a cognizable claim and for failure to join the trusts and Mrs. Calderon as indispensable parties.

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[2] See 10/18/13 Preliminary Objections, ¶¶19-32. All of these facts were admitted without objection by petitioners. See 11/6/13 Answer, ¶¶ 19-32. These details flesh out the factual context to the dispute, but are not relevant to the disposition of the preliminary objections which must be analyzed strictly in terms of the factual allegations of the petition and the documents attached to it.

[3] 10/18/13 Preliminary Objections, ¶¶33-34. The petitioners respond to ¶ 33 as "irrelevant" while admitting ¶ 34. See 11/6/13 Answer, ¶¶ 33-34.

Legal Analysis

The petitioners premise their claim to the Kingsbury stock at issue on a November 1, 1965 "Option to Purchase Agreement" which they attach as an exhibit to their petition. They claim that they are the lineal heirs of Erskine Sr. and with this November 1965 Agreement Erskine Sr." made his surviving lineal descendants primary beneficiaries of stock owned by him at the time of his death."[4] The Kingsbury corporate officers vigorously dispute these claims with three broad arguments. The most compelling argument in their preliminary objections, however, is that the petition fails to state a legally viable cause of action because the November 1, 1965 Agreement did not make petitioners express or implied beneficiaries of their deceased father's shares of stock.[5] The petition must therefore be dismissed for failure to state a claim under Pa.R.C.P. 1028(a)(4).

Under Pennsylvania law, a "demurrer admits every well pleaded material fact set forth in the complaint as well as all inferences reasonably deducible therefrom." Chichester School Dist. v. Chichester Ed. Assoc., 750 A.2d 400, 402 (Pa. Cmwlth. 2000), ***app. denied,*** 568 Pa. 668, 795 A.2d 980 (Pa. 2000)(citations omitted). In analyzing a demurrer, the question presented is whether "on the **facts** averred, the law says with certainty that no recovery is possible," and if there is any doubt, the preliminary objection should be denied. Lerner v. Lerner, 954 A.2d 1229,1234 (Pa. Super. 2008)(emphasis in original). The focus must be on the facts set forth in the complaint or petition as well as the attached documents. In contrast to this properly directed focus, a "speaking demurrer" is "one which, in order to sustain itself, requires the aid of a fact not appearing on the face of the pleading objected to, or, in other words, which assumes the existence of a fact not already pleaded..." Regal Indus. Corp. v. Crum and Forster, Inc., 890 A2d 395, 398 (Pa. Super. 2005). See also Detweiler v. Hatfield, 376 Pa. 555, 558, 104 A.2d 110,113 (Pa. 1954).

Guided by this standard, it is necessary to focus strictly on the November 1, 1965 Agreement and the petitioners' claim that it entitled them to the disputed shares of stock because with the 1965 Agreement Erskine Sr. "made his surviving lineal descendants primary beneficiaries of stock owned by him at the time of his death."[6] In so arguing, petitioners leap from the fact of the 1965 Agreement to an argument as to its interpretation. This distinction is

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[4] 8/30/13 Petition, ¶¶ 3-4.
[5] 10/18/13 Preliminary Objections, ¶ 83.
[6] 8/30/13 Petition, ¶ 4.

critical. For while a demurrer accepts as true all well pleaded, material facts, "it does not admit as true an alleged construction of a written document." Detweiler v. Borough of Hatfield, 376 Pa. at 559, 104 A.2d at 113. The interpretation of a contract is generally a question of law for the court rather than for a jury. When the language of a contract is clear and unambiguous, "a court is required to give effect to that language." Erie Ins. Exchange v. Conley, 29 A.3d 389, 392 (Pa. Super 2011). See also Lesko v. Frankford Hosp., 609 Pa. 115, 123, 15 A.3d 337, 342 (2011)("The meaning of an unambiguous contract presents a question of law").

The November 1965 Agreement is clear, straightforward and unambiguous. In contrast to the petitioners' position, it does not establish beneficiaries to decedent's stock. Instead, its clear purpose was to give the shareholders designated in this Agreement as well as the company an option to buy Kingsbury stock that any of them might wish to sell "before any Stock is sold or otherwise disposed of or for the benefit of any other person not a descendant of Albert Kingsbury." November 1, 1965 Agreement at 1. In greater detail, this Agreement states:

> 2. Option of Stockholders or of Corporation to Purchase Stock.
> Except as hereinafter set forth, no Stockholder or his heirs, executors, administrators, successors, or assigns, shall transfer, assign, sell, pledge, hypothecate, give or otherwise dispose of any of the Stock unless it shall first be offered to the other Stockholders at a stated price per share and in the event the other Stockholders do not accept such offer in whole or in part, such of the offered Stock as is not purchased by the other Stockholders shall be offered at the same price to the Corporation; provided, however, that the foregoing restriction upon the transfer of Stock by a Stockholder shall not apply to transfers of Stock by gift or for the benefit of the Stockholder, or lineal descendant or the Stockholder, or for the benefit of the spouse of a Stockholder for a term or years or for life, but in case of any such transfer, the transferee shall receive and hold such Stock subject to the terms of this Agreement and to the obligations hereunder of the transferring Stockholder.
> Petitioners' Ex. November 1, 1965 Agreement, ¶2 (emphasis added)

The November 1, 1965 Agreement further provides that if none of the Stockholders or the corporation elects to purchase the stock offered for sale, "the offering Stockholder shall be free to transfer the offered Stock in whole or in part at any time within ninety (90) days following the expiration of the Corporation's option...." Petitioners' Ex. November 1, 1965 Agreement, ¶ 3.

By its clear terms, the November 1, 1965 Agreement merely gave all of its parties the option to purchase any stock any other party might wish to sell before that stock was offered for sale to individuals or entities outside the corporation. The stated intent as set forth in the initial

"whereas clause" was to "perpetuate the business and the control and ownership of the Corporation within the descendants of Albert Kingsbury" but the Agreement was quite flexible and ultimately gave the Stockholders the option to offer their shares to others if none of the parties desired to purchase the stock. The Agreement's reference to lineal descendants and/or spouses merely facilitated a Shareholder's right to transfer his shares to his lineal descendants or spouse without first offering those shares to the existing Stockholders. In no way did the Agreement require such a transfer to lineal descendants—as the petitioners assert. Rather, it merely gave the Stockholder the right to do so. Nowhere does the petition state the "fact" that Erskine Sr. transferred his stock to petitioners. Rather, they merely assert that he signed an agreement that gave him the option to do so. By its express terms, the November 1, 1965 Agreement did not transfer any stocks to any lineal heir or spouses. It cannot by strained interpretation be stretched to support petitioners' claim.

The facile petition filed by Wayne Calderon and Erskine Calderon provides scant facts as to Erskine Sr.'s transfer of his shares of Kingsbury stock during his life and upon his death. Ironically, in responding to the respondents' preliminary objections, the petitioners admit those background, general facts. The petitioners admit, for instance, that Erskine Sr. died on August 16, 2008 in North Carolina. They admit that he had been married to their step-mother, Diana Calderon, for 32 years. They admit that on June 23, 1995, at Erskine Sr.'s request, Kingsbury registered his then 400 Shares in the name of "Erskine B. K. Calderon, as Trustee of the Erskine B.K. Calderon Living Trust U/A dated 5/31/95." They admit that by March 28, 2008, as the result of various stock splits, Erskine Sr. owned and held 1,520 Shares of stock in the name of Erskine B.K. Calderon, as Trustee of the Erskine B.K. Calderon Living Trust U/A dated 5/31/95. [7] They do not deny but characterize as "irrelevant" that "[f]ollowing decedent's death on May 29, 2009, at the direction of Mrs. Calderon's counsel, Joseph Roback, Esq. Decedent's 1,520 Shares were divided and transferred to the Trust's identified in Decedent's Living Trust."[8] They admit, moreover, that on January 3, 2011, at the request of Mrs. Calderon's attorney, Kingsbury re-registered the Shares with 874 shares to be held by the Trustees of the Credit Shelter Trust and 646 shares to be held by the Trustee of the Marital Trust.[9] Within the confines for analysis of preliminary objections, these admitted facts, however, are surplusage and are not

[7] ***Compare*** 10/18/13 Preliminary Objections, ¶¶ 19-21, 29, 32 ***with*** 11/6/13 Answer, ¶¶ 19-21, 29, 32.
[8] 10/18/13 Preliminary Objections, ¶33 (emphasis added); 11/6/13 Answer ¶ 32 ("Admitted. Irrelevant").
[9] 10/18/13 Preliminary Objections, ¶ 34; 11/6/13 Answer, ¶ 34 ("Admitted. Irrelevant").

necessary to the conclusion that on its face, the petition and the November 1, 1965 Agreement do not support petitioners' claim to the Kingsbury stock.

In addition to its "legal insufficiency," the petition should be dismissed for failure to join the indispensable parties who have possession of the disputed stocks that the petitioners seek by transfer. Under Pa.R.C.P. 1028 (a)(5), preliminary objections may also be granted based on "nonjoinder of a necessary party." Under Pennsylvania law, "an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any orders or decree of court null and void for want of jurisdiction." Columbia Gas Trans. Corp. v. Diamond Fuel Co., 464 Pa. 377, 379, 346 A.2d 788, 789 (1975). In this case, the persons or entities who presently have possession of the stock clearly have a direct right and connection to the litigation initiated by the petitioners to claim that stock. Although petitioners acknowledge in paragraph 7 that the stock at issue was transferred to "Diana L. Calderon, as sole trustee and sole beneficiary of the Erskine B.K. Calderon Marital Trust" and to "Diana L. Calderon and Matthew M. Calderon as Co-trustees of the Erskine B.K. Calderon Credit Shelter Trust, for the benefit of Diana Calderon as sole-beneficiary," they failed to join Diana Calderon, Matthew Calderon, the Erskine Calderon Marital Trust or the Erskine Calderon Credit Shelter Trust as parties. Instead, they cite only two corporate officers of Kingsbury, Inc. This failure to join indispensable parties, likewise, requires the dismissal of the petition.

Date: March 26, 2004

BY THE COURT:

John W. Herron, J.