

Control No. 120234

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SHERI PENCE	:	DECEMBER TERM 2000
	:	
v.	:	No. 593
	:	
JULIE PETTY, RENEE VERKER and	:	Commerce Program
MICHAEL VERKER	:	

ORDER

AND NOW, this 6th day of February 2001, upon consideration of the plaintiff's petition for a preliminary injunction and oral argument on that petition, and in accordance with the court's contemporaneously-filed findings of fact, discussion and conclusions of law, IT IS HEREBY ORDERED that the petition is DENIED.

BY THE COURT:

JOHN W. HERRON, J.

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FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER
DENYING PETITION FOR PRELIMINARY INJUNCTION

BACKGROUND

Plaintiff Sheri Pence and defendant Julie Petty were, until recently, fifty-fifty shareholders and co-managers of the Martini Cafe. For quite some time, Pence and Petty have not been on speaking terms. The court will not hazard a guess as to how they managed to keep the business afloat while barely communicating with each other, but in November 2000, the inevitable happened and Petty jumped ship. For a whole dollar, she sold her shares in the business to Renee Verker, the sister of the restaurant's landlord.

Petty did not tell Pence about the sale. Instead, Pence learned about the deal from Renee Verker. Pence does not want her new partner. Pence claims that she and Petty had an oral agreement restricting the transfer of their shares. She claims that Renee Verker is fronting for her brother, Michael Verker, and that Michael Verker is trying to muscle Pence out of the business.

Pence petitioned this court for a preliminary injunction barring Renee and Michael Verker from

exercising any ownership interest in the Martini Cafe. The court held a hearing on the petition on December 22, 2000. After counsel for Pence rested his case, the court orally denied the petition from the bench. The court now issues the following findings of fact, discussion and conclusions of law in support of that order.

FINDINGS OF FACT

1. Martini Cafe Corporation, a Pennsylvania corporation, is a restaurant and bar. N.T. 28; Ex. P-1 and P-2.
2. Plaintiff Sheri Pence and defendant Julie Petty incorporated Martini Cafe on January 3, 1996. N.T. 97. Each held 50 shares of the total 100 shares of the company. N.T. 26, 97-98; Ex. P-1 and P-2.
3. Pence is vice-president and secretary of Martini Cafe. N.T. 133; Ex. P-6. Until her November 15, 2000 resignation, Petty was president and treasurer. N.T. 26, 27; Ex. P-6.
4. On the face of each of the Martini Cafe share certificates is the following inscription: “The transfer of this stock is restricted in accordance with the terms of a shareholders’ agreement on file with the Secretary of the Corporation.” Ex. P-1 and P-2; N.T. 98-99.
5. There is no written agreement between Pence and Petty restricting the transfer of the shares. N.T. 34-35, 116-21.
6. On November 16, 2000, Petty sold her 50 shares to Renee Verker for a dollar. N.T. 38-40, 63; Ex. P-6.
7. Petty did not offer her shares to Pence before transferring them to Renee Verker. N.T.

DISCUSSION

Pence alleges that she and Petty had an oral shareholders agreement in which Pence and Petty each agreed to give the other a first option¹ to buy any shares before selling to a third party. Pence asks the court to issue a preliminary injunction enforcing that agreement against Renee Verker, barring Renee and Micheal Verker² from exercising any ownership interest in the shares, and barring Renee and Michael Verker from entering the premises of the Martini Cafe. The court must deny the petition.

“[A] preliminary injunction is a most extraordinary form of relief which is to be granted only in the most compelling cases.” Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa.Super. 495, 597 A.2d 141, 144 (1991). The court may grant the injunction only if Pence establishes, among other things, a clear right to relief for an actionable wrong. School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass’n, 542 Pa. 335, 667 A.2d 5, 6 n.2 (1995); New Castle Orthopedic Assocs. v. Burns, 481 Pa. 460, 392 A.2d 1383, 1385 (1978). To show that she has a clear right to relief against Renee Verker, Pence must show that the first option agreement is enforceable against Renee Verker. Pence cannot make such a showing because an oral transfer restriction agreement is not enforceable against a transferee who does not actually know of the restriction at the time of transfer. 15 Pa.C.S.A. § 1529(f).

¹ A first option provision “grant[s] the corporation, its officers or directors, or other shareholders a preemptive right (sometimes referred to as a right of ‘first refusal’) to shares which a holder decides to sell or transfer.” 1 F. Hodge O’Neal and Robert B. Thompson, Close Corporations § 7.05 (3 ed. 1987).

² Michael Verker has been participating in the operation of the Martini Cafe allegedly on his sister’s behalf. N.T. 73.

The court accepts for the sake of this discussion that Pence and Petty orally agreed to give each other a first option. An unwritten transfer restriction agreement may be enforceable against Petty. 15 Pa.C.S.A. § 1529(b) (containing no express requirement that transfer restriction agreement be written to be enforceable against a party to the agreement); 13 Pa.C.S.A. § 8113 (repealing 13 Pa.C.S.A. § 8319, the UCC statute of frauds for contracts for the sale of securities). The BCL imposes stricter requirements, however, for enforcing a transfer restriction against a transferee of the shares:

Notice to transferee.--A written restriction on the transfer or registration of transfer of a share or other security of a business corporation, if permitted by this section and noted conspicuously on the face or back of the security . . . may be enforced against the holder of the restricted security or any successor or transferee of the holder, including an executor, administrator, trustee, guardian or other fiduciary entrusted with like responsibility for the person or estate of the holder. Unless noted conspicuously on the security or in the notice provided by section 1528(f) . . . , a restriction, even though permitted by this section, is ineffective except against a person with actual knowledge of the restriction.

15 Pa.C.S.A. 1529(f).

Section 1529(f) distinguishes between transferees with actual knowledge and transferees without actual knowledge. *Id.* On the factual record, the court cannot find that Renee Verker actually knew of the transfer restriction when she bought Petty's shares. N.T. 90. To enforce a transfer restriction against a transferee without actual knowledge of the restriction at the time of transfer, (1) the transfer restriction must be in writing, (2) it must be permitted by § 1529 and (3) it must be noted conspicuously on the face of the security. 15 Pa.C.S.A. § 1529(f).

The transfer restriction satisfies the second and third requirements. It is "permitted," because it obligates a selling shareholder to offer to the remaining shareholder a prior opportunity to acquire the

shares. 15 Pa.C.S.A. § 1529(c)(1). It is “noted conspicuously” on the face of the security, because the inscription on the share certificate conspicuously states that a transfer restriction exists. See 13 Pa.C.S.A. § 8204(1) cmt. 2 (stating that the word “noted” in the UCC transfer restriction provision “is used to make clear that the restriction need not be set forth in full text.”).³

But the transfer restriction fails the first requirement. To be enforceable against a transferee without actual knowledge, a transfer restriction must be in writing. Pence alleges only that she and Petty had an oral agreement.

Since the record does not now show that Renee Verker had actual knowledge of the unwritten transfer restriction, Pence cannot enforce that oral agreement against Renee Verker. Pence does not have a clear right of relief against Renee Verker, and the court must deny the petition for a preliminary injunction.⁴

³ UCC Article 8 imposes requirements on transfer restrictions to which the corporation is a party:

§ 8204 Effect of issuer's restriction on transfer

A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless:

- (1) the security is certificated and the restriction is noted conspicuously on the security certificate; or
- (2) the security is uncertificated and the registered owner has been notified of the restriction.

13 Pa.C.S.A. § 8204. Because the shareholders, rather than the corporation, imposed the Martini Cafe transfer restriction, § 8204 does not apply. 13 Pa.C.S.A. §8204 cmt. 5 (stating that “[t]his section deals only with restrictions imposed by the issuer [It does not] deal with private agreements between stockholders containing restrictive covenants as to the sale of the security.”).

⁴ The denial of the petition does not stop Pence from offering evidence at trial that Renee Verker had actual knowledge of the first option agreement.

CONCLUSIONS OF LAW

1. The first option agreement is not enforceable against Renee Verker because there is no written transfer restriction and Pence has not shown that Renee Verker actually knew of the transfer restriction when Renee Verker bought the shares.

2. Pence has not shown that she has a clear right to relief.

The court will enter a contemporaneous order denying the petition for a preliminary injunction.

BY THE COURT:

JOHN W. HERRON, J.

DATE: February 6, 2001