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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

JOHN CATALANO,

Plaintiff(s),

INDEX No. 2653/01

-against-

MOTION DATE: N/A

QUEENS BOULEVARD EXTENDED CARE
FACILITY CORP., ANTHONY CLEMENZA,
and SIDNEY STEINBERG, individually,
and as shareholders, directors and
officers of QUEENS BOULEVARD EXTENDED
CARE FACILITY CORP.,

Defendant(s)

Plaintiff John Catalano commenced this action seeking a declaratory judgment that he is the holder of a five percent interest in Defendant Queens Boulevard Extended Care Facility Corporation; an order directing that he be issued a stock certificate representing that interest and an accounting. The issues were bifurcated at the Court's direction with the issue of Plaintiff's ownership interest tried first. The following are the Court's Findings of Fact and Conclusions.

Findings of Fact

Plaintiff John Catalano and Defendant Anthony Clemenza are cousins and Defendant's father, James Clemenza who is now deceased, was Plaintiff's uncle. Defendant Sidney Steinberg has been associated in business with Defendant Anthony Clemenza.

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A document (Exhibit #1) dated May 8, 1986 and signed by Plaintiff, Defendants Clemenza and Steinberg and by the late James Clemenza reflects that Plaintiff made a "capital contribution" of \$75,000 toward a "Long Beach Property and Project". In addition to other information as to the respective parties' contributions, the document reflects that the ownership interests of the parties in the project were to be: Defendants Clemenza and Steinberg 35% each, the late James Clemenza 25% and Plaintiff 5%. The check reflecting the \$75,000 payment (Exhibit #2) bears the date June 23, 1986. It is undisputed that the Long Beach Project never became a reality and Plaintiff's \$75,000 was never returned.

On or about Feb. 27, 1989, the same four parties executed an agreement (Exhibit #3) for the creation of a "Subchapter S" corporation to own and develop as residential condominiums with stores certain real property located on Emmons Avenue in Brooklyn. The ownership interests were the same as for the intended Long Beach project. Bearing the same date is a virtually identical agreement signed by the same individuals for another "Subchapter S" corporation to own and develop real property located at Hylan Boulevard and Fairlawn Avenue on Staten Island. This property was to be developed "for mixed residential and commercial use."

On the following day, Feb. 28, 1989, Anthony Clemenza and Sidney Steinberg each transferred to John Catalano two and a half shares (for a total of five shares) in 61-01 Realty;

"on the condition that Clemenza and Steinberg, shall work harmoniously with Catalano in projects now in progress. At that time, Capital Investment by Catalano shall be mutually agreed upon by Anthony Clemenza, Sidney Steinberg and John Catalano."

61-01 Realty owned title to certain real estate located on Queens Boulevard upon which The Facility was ultimately built.

On March 1, 1989, John Catalano issued a check to Fairlyn Realty Company in the amount of \$165,000.00. Defendant Anthony Clemenza testified that Fairlyn developed thirty-nine condominium units on the Staten Island property, but suffered a loss. Jon A. Nixon, a certified public accountant, testified that Fairlyn Realty reported a loss to the taxing authorities which, as a "Subchapter S" corporation, was passed through to shareholders Clemenza and Steinberg, but not to Plaintiff. The tax returns themselves were not offered nor was any effort made to account for the \$165,000.00 invested by Plaintiff.

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Sometime between February of 1989 and February of 1994 James Clemenza died and Anthony Clemenza became the executor of his estate. By this time the parties were contemplating developing the Queens Boulevard property as a nursing home. As early as November of 1993 Defendants Clemenza and Steinberg had discussed with Plaintiff Catalano his employment as general supervisor for the project. Defendants Clemenza and Steinberg met with Plaintiff in January of 1994 and three writings were created as a result of that meeting all of which bear the date Feb.15, 1994, although the testimony at trial indicated that they were executed sometime thereafter. These three writings constitute the core of this controversy.

Harold Pearlman, at the time Jon Nixon's partner and also a certified public accountant, testified that at the direction of Messers. Clemenza, Steinberg and Catalano he caused to be created two of these documents. One of these relates to 61-01 Realty Corporation and was admitted into evidence as both Exhibit 7 and Exhibit 10. Signed by all of the parties with Anthony Clemenza signing on behalf of the Estate of James Clemenza and witnessed by Mr. Pearlman, it states in pertinent part:

“ At a meeting this day, at 81-08 Avenue L, Brooklyn, NY 11236, the office of 61-01 Realty Corp, . . . ; it was agreed and established that the capital stock of the above named corporation is owned as following:

Anthony Clemenza	37 ½%
Sidney Steinberg	32 ½%
John Catalano	5%
Estate of James Clemenza	<u>25%</u>
<u>Total</u>	100%

It is further agreed and established that Sidney Steinberg and Anthony Clemenza shall each receive a builder's fee of five hundred thousand (\$500,000) dollars which shall be paid prior to the payment of any dividends or other distributions or payments to any of the stockholders. All loans made by the stockholders to the corporation shall then be repaid before any dividend payments or other distributions to any of the shareholders.”

The second writing relates to the “Emmons Avenue Development Corp” and was similarly executed and witnessed. It states in pertinent part:

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“ At a meeting this day, at 81-08 Avenue L, Brooklyn, NY 11236, the office of Emmons Avenue Development Corporation, . . . ; it was agreed and established that the capital stock of the above named corporation is owned as followed (sic):

Anthony Clemenza	37 ½%
Sidney Steinberg	32 ½%
John Catalano	5%
Estate of James Clemenza	25%

It is further agreed and established that John Catalano's portion of the total stockholders loans Payable is \$75,000.00 any dividends or other distributions or payments to any of the stockholders.

All loans made by the stockholders to the corporation shall be repaid before any dividend payments or other distributions to any of the shareholders.”

The third writing is entitled “Employment Understanding Between CCS Queens Corporation and John Catalano” (Exhibit 9). Though dated Feb. 15, 1994 as is the writing related to 61-01 Realty, it is headed “Queens Boulevard Extended Care Center” which was the name chosen for the development on the Queens Boulevard property. There is no evidence as to who caused this document to be prepared. It is signed by Plaintiff and by Defendants Steinberg and Clemenza on behalf of “CCS Queens Corporation,” but the signatures were not witnessed by Harold Pearlman. There was testimony that its subject matter had been under discussion since at least the preceding November. The writing with the crossed out portions omitted states:

“ The following are the business terms of the employment relationship between CCS Corporation (“Employer”), and John Catalano (“Employee”):

1. Title: General Superintendent.
2. Duties: Complete responsibility for all aspects of the construction of the Queens Boulevard Extended Care Facility.
3. Term: Commencing on or about Sept 1994 through the entire duration of construction.
4. Base salary: \$130,000.00.
5. Bonus: \$17,271.56.

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6. Benefits: Life and accidental death and dismemberment insurance equal to the amount of \$300,000.00 each. Comprehensive non-contributory family medical and dental insurance. To be received immediately.
7. Expenses: reimbursement for expenses incurred in connection with employment is unlimited. Employee shall also be reimbursed for automobile expenses of \$650.00 per month plus expenses for repairs unlimited.
8. Vacation: 4 weeks vacation or compensation equal to same at employees discretion.
9. Sick Days: Unlimited.
10. Disability: upon commencement of illness or injury that prevents the employee from working the employee will be paid for 6 months at your then current rate of pay.
11. Severance: In the event that your employment is terminated by the company for reasons other than cause, you will be paid severance pay equal to the duration of the construction at your then current rate of pay."

It is to be noted that the "Employment Understanding" does not require that John Catalano work "full time" nor that he leave his then employer Lehrer, McGovern & Bovis on whose behalf he was then supervising a construction project in Manhattan. Nevertheless, the parties agree that it was contemplated that Plaintiff would leave Lehrer, McGovern & Bovis and would work "full time".

For reasons related to government supervision of nursing home construction and operation Defendants Clemenza and Steinberg determined that the project should be named the Queens Boulevard Extended Care Facility and the property owned in that name. The Certificate of Incorporation (Exhibit 25) reflects that the corporation was formed on or about April 29, 1994 and on May 24, 1994 61-01 Realty Corporation deeded the property to Queens Boulevard Extended Care Facility Corporation (Exhibit 30). There was then created another writing executed by the parties and witnessed by Harold Pearlman which bears the date May 26, 1994. Admitted into evidence as Exhibit 11, it states in pertinent part:

" At a meeting this day, at 8108 Avenue L, Brooklyn, N.Y. 11236, the office of Queens Boulevard Extended Care Facility Corp., . . . ; it was agreed and established that the capital stock of the above named corporation is owned as following:

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Anthony Clemenza	62 ½%
Sidney Steinberg	32 ½%
John Catalano	<u>5%</u>
Total	100%

It is further agreed and established that Sidney Steinberg and Anthony Clemenza shall each receive a builder's fee of five hundred thousand (\$500,000) dollars which shall be paid prior to the payment of any dividends or other distributions or payments to any of the stockholders. All loans made by the stockholders to the corporation shall then be repaid before any dividend payments or other distribution to any of the stockholders.

As of 12/31/93 loans made by Anthony Clemenza and Sidney Steinberg total \$5,065,118.00.

Every six months, any additional loans made by above stockholders will be Noted and Recorded."

According to Abraham Allen Miller who testified that he worked under Plaintiff John Catalano as project manager, the project proceeded in three phases. The design phase commenced in October of 1993 and ran until the start of the construction phase in June of 1994. The third or completion followed in the month of November 1995 and the project was completed on schedule. Mr. Miller testified that he was employed for the entire period from design to completion and was thus on the job in February of 1994 when the "Employment Understanding" was executed. According to Mr. Miller, the Plaintiff was present on site daily for at least ten months of the project and throughout the construction phase except that about nine months into construction Plaintiff missed approximately one week due to a heart procedure. Otherwise Plaintiff was there when needed.

It is undisputed, however, that Plaintiff continued his employment with Lehrer, McGovern & Bovis and his work on their project in Manhattan. Plaintiff testified that Lehrer, McGovern & Bovis adjusted his hours to permit him to work nights. He would then leave Manhattan in the morning and proceed to Queens Boulevard where he would supervise construction. While he was not present at all times when construction was underway, he was there everyday except the week during which he was incapacitated and his hours ranged from five to seven hours a day and longer. Defendant's never questioned the hours Plaintiff was

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putting in nor did they ever demand that he put in more time. No one was hired to perform any duties which he failed to perform. Defendants testified that Mr. Miller fulfilled the role of general supervisor, but offered no explanation as why it was necessary to negotiate with and retain Plaintiff as general supervisor when Mr. Miller was already at work on the project.

Plaintiff was never paid by the Queens Boulevard Extended Care Facility pursuant to the "Employment Understanding". Rather \$70,000 and perhaps an additional \$15,000 was paid to Plaintiff's corporation CPX Consulting by George Early and the Early Bird Construction Company. Mr. Early was the architect for the project. According to Plaintiff this payment plan was devised by Defendants because Architect Early owed them money. Defendants testified that Plaintiff was the Architect's employee and that any services he rendered were rendered on behalf of the Architect. No testimony was offered from the Architect or anyone associated with the Architect nor was any explanation given on the record for the failure to substantiate the Defendants' claims.

The record is silent as to the period from November 1995 until February of 2000 when Plaintiff wrote to Defendants complaining that he had not received a stock certificate nor any distribution from the corporation. This action was then commenced in February of 2001.

Conclusions of Law

The document (Exhibit 11) dated May 26, 1994 signed by Defendants Anthony Clemenza and Sidney Steinberg and witnessed by Harold Pearlman is an unqualified declaration that Plaintiff John Catalano is five percent shareholder in Queens Boulevard Extended Care Facility Corporation.

Defendants contend that Plaintiff's acquisition of an interest in the Queens Boulevard Extended Care Facility Corporation was unsupported by consideration. Unlike the Fairlawn Realty and the Emmons Avenue Development, there has been offered into evidence no agreement with respect to the formation of 61-01 Realty Corporation or the Queens Boulevard Extended Care Facility Corporation. While the Feb. 28, 1989 declaration of shareholder interests in 61-01 Realty Corporation (Exhibit 5) conditions the transfer to Plaintiff of five shares upon Defendants Clemenza and Steinberg "working harmoniously with Catalano in projects

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now in progress”, this language was not repeated in either the Feb. 15, 1994 declaration of shareholders interests (Exhibits 7 and 10) nor the May 26, 1994 declaration with respect to the Queens Boulevard Extended Care Facility Corporation (Exhibit 11). Moreover, according to the testimony, the only project in progress in February of 1989 in which John Catalano was involved was the Fairlyn Realty Corporation’s development on Staten Island and there was no evidence that Plaintiff failed to cooperate on that project. Rather the evidence reflects that Plaintiff invested first \$75,000 and then \$165,000 upon which he received no return. There is no claim that Plaintiff was ever thereafter asked to make any further investments.

The figure \$75,000 appears again in the Feb. 15, 1994 declaration of shareholders interests with respect to the Emmons Avenue Development Corporation (Exhibit 8) wherein it is recited that there is a loan payable to Plaintiff of \$75,000 although there is no evidence that Plaintiff had put any additional cash into the project. According to Defendant Anthony Clemenza that project, like Fairlawn Realty before, resulted in a loss which was passed through to shareholders Clemenza and Steinberg, but not Plaintiff. In any event, there is no evidence that Plaintiff failed to work “harmoniously” as he was required to do.

Defendants contend that Plaintiff’s receipt of a five percent interest was contingent upon his performing the employment contract dated Feb. 15, 1994. There is no reference in the declaration of shareholders interests to the employment contract and no reference in the employment contract to Plaintiff’s interest as a shareholder. According to its Certificate of Incorporation (Exhibit 25), the Queens Boulevard Extended Care Facility Corporation was not incorporated until April 29, 1994 and the declaration of shareholders interests dated May 26, 1994 (Exhibit 11) makes no reference to the employment contract although it does recite that Defendants Clemenza and Steinberg are to receive “builder’s fees” and the balances in their loan accounts.

There is no evidence that Plaintiff breached his employment contract. Although it was contemplated that Plaintiff would leave Lehrer, McGovern & Bovis and work “full time” on the project, no such terms were contained in the written contract. There is no evidence that Plaintiff failed to perform the duties expected of him nor that any additional costs were incurred by virtue of anything he did or failed to do. Defendant’s never told Plaintiff he was violating the terms of the contract nor called upon him to honor their understanding that he would work “full time”. Abraham Allen Miller, who the Defendants claim performed the duties Plaintiff

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was supposed to perform was, according to his testimony, already at work on the project when the employment contract was signed. He testified that Plaintiff was the "executive in charge". There is no evidence that Mr. Miller's compensation or duties were ever increased in consequence of Plaintiff's failure to perform under the employment understanding.

Defendants contend that whatever services Plaintiff performed were performed on behalf of the architect and not in fulfillment of the employment understanding. No evidence has been offered in support of this contention and the Court credits Plaintiff's testimony that he was paid by the architect at the behest of Defendants and in the furtherance of their interests.

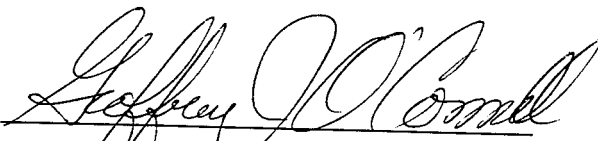
The Court declares Plaintiff to be the owner of shares representing a five percent interest in the Queens Boulevard Extended Care Facility Corporation and directs that he be issued stock certificates reflective of that interest.

The parties are directed to appear on September 20, 2002 for a Preliminary Conference with respect to the Accounting.

It is, SO ORDERED.

Dated:

Aug 21, 2002


HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

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AUG 27 2002

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**