[Cite as *Stern v. Shainker*, 2009-Ohio-2731.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92301

ROBERT STERN

PLAINTIFF-APPELLANT

vs.

SANFORD SHAINKER

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-656457

BEFORE: Rocco, J., Gallagher, P.J., and Kilbane, J.

RELEASED: June 11, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

H. Alan Rothenbuecher
Matthew T. Green
Schottenstein, Zox & Dunn Co., L.P.A.
US Bank Centre at Playhouse Square
1350 Euclid Avenue, Suite 1400
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEE

Keith R. Kraus
Richard N. Selby, II
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} Plaintiff-appellant, Robert Stern, appeals from a common pleas court order dismissing his complaint for failure to state a claim. He asserts that he presented viable claims for promissory estoppel and equitable estoppel, and the court applied an incorrect legal standard in ruling on defendant-appellee Sanford Shainker's motion. We find the complaint fails to state a claim and therefore affirm the common pleas court's judgment.

Procedural History

{¶ 2} The complaint filed April 10, 2008 asserts that Stern and Shainker were two of the four former shareholders of Kronheims Furniture Inc. Some time in 2001, three of the shareholders, Stern, Shainker, and Eugene Phinick, reached a "general understanding and agreement" that "they would align their interests in Kronheims" for the purpose of taking control of the company, getting rid of an ineffective officer, and positioning the company for sale. According to the complaint, in January or February 2003, "Shainker acknowledged his understanding and agreement with Stern that they would maintain control over Kronheims and position it for sale to a third party." Stern claimed that, in reliance on this agreement, he executed a personal guarantee for Kronheims.

{¶ 3} The complaint alleges that the fourth shareholder, Nancy Koreness, offered to purchase Stern's shares. Stern declined, in reliance on the agreement with Shainker and Phinick. Shortly thereafter, however, Shainker informed

Stern that he had sold his shares to Koreness, giving Koreness ownership of more than sixty percent of Kronheims' shares and control of the company. Phinick had agreed, with the knowledge and approval of the other shareholders, to sell his shares back to the corporation for distribution pro rata among the other shareholders, although the company only bought back three of Phinick's shares. Kronheims went out of business in 2005.

{¶ 4} In his first cause of action, Stern asserted that Shainker's promise to align his interests with Stern to control and position the company for sale created a reasonable expectation that Shainker would vote with Stern to effect a sale, and in reliance on this promise, Stern personally guaranteed company debt and forewent the opportunity to sell his shares, suffering damages of more than $700,000. In a second cause of action, Stern claimed that Shainker made a misleading representation of his intention to align his interests with Stern, and Stern relied upon this representation by executing the personal guarantee and foregoing a sale of his stock.

{¶ 5} Shainker filed a motion to dismiss on the ground that the complaint failed to state a claim. He asserted that the complaint did not allege a claim for promissory estoppel because it did not allege that he made a clear and unambiguous promise to Stern not to sell his shares, and it was unreasonable for Stern to rely on the vague promise to "align his interests" with plaintiff.

Shainker further argued that equitable estoppel does not give rise to an affirmative claim, but is a defense.

{¶ 6} The court granted Shainker's motion to dismiss, holding that:

{¶ 7} " * * * Accepting the allegations in the complaint as true for purposes of this motion, the court finds that plaintiff cannot prove his assertions that defendant 'clearly and unambiguously' agreed not to sell his stock in the company. Plaintiff asserts that while there was no specific commitment regarding the sale of the shares, nevertheless he states that this was 'implied.' At the case management conference, plaintiff's counsel was asked by the court and he conceded that there was no agreement or understanding that plaintiff was to be given a right of first refusal to purchase defendant's shares in the company. However, in light of the allegations in plaintiff's complaint and arguments as set forth in his memorandum in opposition to defendant's motion to dismiss, such a conclusion would seem to equally follow logically from defendant's alleged promise to 'align his interests' with plaintiff's. Of course, such an argument would clearly involve building one inference upon another inference. The point is that the allegations made by plaintiff in his complaint lead to numerous suppositions that apparently cannot be substantiated. Promissory/equitable estoppel cannot be constructed on such a string of inferences or suppositions. The complaint is hereby dismissed."

Law and Analysis

{¶ 8} We review the court's ruling on Shainker's motion to dismiss de novo. *Ryan v. Ambrosio*, Cuyahoga App. No. 91036, 2008-Ohio-6646, ¶9. "When reviewing a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiffs. For the moving defendants to prevail, it must appear from the face of the complaint that the plaintiffs can prove no set of facts that would entitle them to relief." *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 465, 2004-Ohio-5717, ¶11.

{¶ 9} The parties agree that, in order to state a claim for promissory estoppel, the plaintiff "must establish the following elements: 1) a clear and unambiguous promise, 2) reliance on the promise, 3) that the reliance is reasonable and foreseeable, and 4) that he was injured by his reliance. *Patrick v. Painesville Commercial Properties, Inc.* (1997), 123 Ohio App.3d 575, 583. 'A clear and unambiguous promise is the type that the promisor would expect to induce reliance. This element is not satisfied by vague or ambiguous references.' *Casillas v. Stinchcomb*, Erie App. No. E-04-041, 2005-Ohio-4019, ¶19." *Williams v. United States Bank Shaker Square*, Cuyahoga App. No. 89760, 2008-Ohio-1414, ¶11.

{¶ 10} The complaint does not allege that Shainker clearly and unambiguously promised not to sell his shares to Koreness. The promise to "align his interests" with Stern is vague. A promise to exercise his shareholder

voting rights in concert with Stern may be reasonably inferred. However, Shainker did not clearly promise to retain ownership, much less to keep Koreness from acquiring majority control, nor can such promises reasonably be inferred from a promise to "align interests." A promise to act together with respect to corporate governance does not include a promise not to sell one's shares or to allow another shareholder to acquire majority control. Therefore, we agree with the common pleas court that the complaint fails to state a claim for promissory estoppel.

{¶ 11} We also agree that the second count of the complaint failed to state a claim. "Equitable estoppel precludes recovery when 'one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts, to his detriment.'" *Glidden v. Lumbermen's Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, ¶52. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice." *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶43, quoting *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145.

{¶ 12} "Equitable estoppel is therefore 'a shield, not a sword. It does not furnish a basis for damages claims, but a defense against the claim of the stopped party.'" *Abdallah v. Doctor's Assns.*, Cuyahoga App. No. 89157, 2007-Ohio-6065, ¶15, quoting *First Fed. S. & L. Assn. v. Perry's Landing, Inc.* (1983),

11 Ohio App.3d 135, 144. Therefore, Stern cannot state an affirmative claim based upon equitable estoppel.

{¶ 13} For these reasons, we conclude that the complaint in this case fails to state a claim. Therefore, we affirm the common pleas court's judgment.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR