

14-1328

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

BERNARD V. BOSSIO,

Plaintiff,

CASE NO.: 08-C-821

Judge: Russell M. Clawges, Jr.

v.

SAM BOSSIO a/k/a SAMUEL
BOSSIO a/k/a SAVARIO BOSSIO,
BOSSIO ENTERPRISES, INC.,
and the Estate of LUIGI BOSSIO
a/k/a LOUIS BOSSIO

Defendants.

AMENDED ORDER

This Amended Order shall serve to amend the Order of this Court dated September 5, 2014, in the above captioned action.

Accordingly, it is ORDERED that the stock purchase agreement is valid and binding upon all the parties in this matter. The terms and substance of this agreement are set forth in the document introduced as Plaintiff's Exhibit 2, with the exception of Section Three, Life Insurance.

In regard to the Defendant the Estate of Luigi Bossio a/k/a Louis Bossio's Motion for Clarification of Trial/Judgment Opinion Order, it is further ORDERED that it was the intention of the Court to find that the 1982 Stock Purchase Agreement was superseded by a 1990 agreement of the parties, and that the basic difference between the 1982 agreement and the 1990 agreement was the fact that the 1982 agreement required life insurance and had a provision for what would happen if the life insurance was not maintained. The Court further finds that the 1990 agreement removed the requirement of life insurance and, therefore, would have removed

any consequences of not having life insurance. In fact, it is the Court's opinion that the purpose of the 1990 agreement was to make the life insurance modification of the 1982 agreement, and to basically keep the 1982 agreement in place otherwise.

It is further ORDERED that, pursuant to W.Va. Code § 58-5-1 and W.Va.R.C.P. 54, effective this date, this Amended Order represents a final judgment/order as to Count I of the Second Amended Complaint of Plaintiff Bernard Bossio. The Court finds and determines there is no just reason for delay of an appeal of the subject matter of this Amended Order. Furthermore, no bond is needed should an appeal be taken by any party herein.

The Court directs the Clerk of the Circuit Court of Monongalia County to distribute certified copies of this Amended Order to all counsel and/or parties of record.

Enter this 1st ^{December} day of ~~November~~ 2014,



Russell M. Clawges, Jr., Judge
17th Judicial Circuit, Division II.

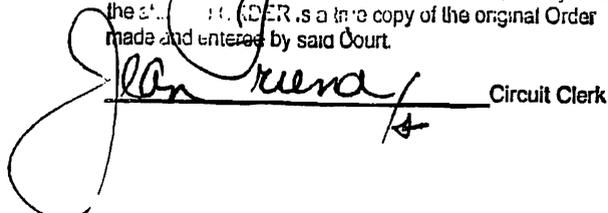
ENTERED Dec 1, 2014

DOCKET LINE #: 122

JEAN FRIEND, CIRCUIT CLERK

STATE OF WEST VIRGINIA SS

I, Jean Friend, Clerk of the Circuit and Family Courts of Monongalia County, West Virginia, do hereby certify that the above ORDER is a true copy of the original Order made and entered by said Court.



Circuit Clerk

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

BERNARD V. BOSSIO,

Plaintiff,

v.

CASE NO.: 08-C-821

Judge Russell M. Clawges, Jr.

SAM BOSSIO a/k/a SAMUEL
BOSSIO a/k/a SAVARIO BOSSIO,
BOSSIO ENTERPRISES, INC.,
And the Estate of LUIGI BOSSIO
a/k/a LOUIS BOSSIO,

Defendants.

TRIAL/JUDGMENT OPINION ORDER

On the 4th day of March 2014, this action came on for a trial before the Court without a jury. Plaintiff, Bernard V. Bossio, appeared by counsel, Brian P. Must and Alex J. Shook. Defendant Sam Bossio appeared by counsel, Samuel H. Simon and Matthew J. Lautman. Defendant, Estate of Luigi Bossio appeared by counsel, Michelle L. Bechtel. Defendant, Bossio Enterprises, Inc. was not represented.

The Court, having heard all arguments, received testimony, and examined all evidence presented, makes the following Findings of Fact and Conclusions of Law upon proof by clear and convincing evidence.

Findings of Fact

1. Bossio Enterprise, Inc. was formed in 1979. There were three (3) equal shareholders:

Luigi Bossio¹ and his two sons, Sam and Bernard Bossio. Each owned ten (10) shares of the Company. Plaintiff's Exhibit 1.

2. Initially the Corporation ran pizza shops. Today, the primary business is residential and commercial real estate.
3. At issue is the existence of a stock purchase agreement, also referred to as a buy-sell agreement, which was purportedly implemented in 1982 and revised in 1990. This agreement required the Corporation to purchase the stock of a deceased shareholder. The 1982 Agreement also required the corporation to purchase a life insurance policy on each of the three shareholders. The proceeds of the life insurance and the Corporation's surplus would be used to purchase the shares of the deceased shareholder. Plaintiff's Exhibit 2.
4. The stock purchase agreement further stated that upon the death of any shareholder, the decedent's estate shall sell all of the decedent's stock in the Corporation to the Corporation. A purchase price for that stock would be established by and through Section Two of the Stock Purchase Agreement. Plaintiff's Exhibit 2.
5. Luigi Bossio died testate in 2007. His will provided for the creation of a trust for the benefit of his wife, Emilia. The corpus of the trust was to be comprised of all of Luigi's personal property. Luigi's ten shares of Bossio Enterprises are not mentioned specifically in his will. Estate's Exhibit 3. The Estate of Mr. Bossio has not sold its shares back to the Company.
6. Joseph Marshalek, a certified public accountant, was employed by the Corporation as its treasurer and chief financial officer from July 1982 until January 1993. He handled

¹ Luigi Bossio typically signed his name as Louis Bossio.

IRS-related matters and drafted some legal documents.

7. Mr. Marshalek testified that he does not specifically recall recommending the company to implement a stock purchase agreement, but that it was possible.
8. An unsigned copy of a Stock Purchase Agreement was submitted. Plaintiff's Exhibit 2. Mr. Marshalek testified that the handwritten notes on pages 1, 3, and 7 of that document were made by him.
9. Mr. Marshalek testified that although he could not recall specifics about when and where the Agreement was signed, he could generally remember it being signed.
10. The 1982 Stock Purchase Agreement was drafted by attorney David Straface. Section Six of the Agreement, entitled, ENDORSEMENT OF STOCK CERTIFICATES, provides in part as follows:

Upon the execution of this agreement the certificates of stock subject hereto shall be surrendered to The Corporation and endorsed as follows: "This certificate is transferable only upon compliance with the provisions of an agreement dated _____, 19__, among Bossio Enterprises, Inc., Louis Bossio, Sam Bossio and Bernard Bossio, a copy of which is on file in the Office of the Secretary of the Corporation."
11. Bernard Bossio testified that the 1982 Stock Purchase Agreement was signed by Sam, Luigi, and himself at the Corporation's office sometime in 1982, that he witnessed the other two shareholders sign the Agreement, and that it was signed while in the presence of Mr. Marshalek in Mr. Marshalek's office.
12. Bernard Bossio further testified that after the Agreement was signed, it was placed in a manila folder that had the words "Buy-Sell Agreement" written on the tab and then the Agreement and folder were placed in the Company's safe.
13. Mr. Marshalek testified that the words "Buy-Sell Agreement" on the tab of the manila

folder are written in his handwriting and that he would have placed the executed 1982 Agreement into that folder. Plaintiff's Exhibit 8.

14. Sam Bossio testified that he could recall discussions about a buy-sell agreement in 1982. However, he further testified that he could not recall seeing a draft of an agreement and could not recall signing an agreement.

15. Section Three of the 1982 Agreement provides in relevant part as follows:

In order to provide ready funds with which to finance the purchase contemplated in SECTION ONE hereof [PURCHASE OF STOCK ON DEATH], The Corporation has heretofore procured or shall hereafter procure policies of life insurance upon the life of each shareholder...

The Corporation shall pay all premiums on insurance policies taken out by it pursuant to this Agreement and shall give proof of payment to the shareholders within fifteen (15) days after the due date of each premium.

16. Mr. Marshalek testified that life insurance policies were purchased by the Corporation pursuant to the terms of the 1982 Agreement. By September 26, 1990, the policies were paid up, per a letter Mr. Marshalek wrote to The Equitable Financial Companies. Plaintiff's Exhibit 3. The policy numbers referenced in the letter are the same policy numbers listed in the Schedule of Life Insurance Policies to Which This Agreement Relates section of the draft of the 1982 Agreement. Plaintiff's Exhibit 2.
17. Bernard Bossio testified that in the latter part of the 1980s Bossio Enterprises had cash flow problems and had to borrow against the life insurance policies for operating cash. Sometime in the 1990s the policies were cancelled for nonpayment.
18. Bernard Bossio further testified that in 1990 the stock purchase agreement for Bossio Enterprises was revised. The only thing noteworthy was that in the new agreement having life insurance to help pay for the stock of a deceased member was optional.

19. Bernard Bossio testified that the 1990 Agreement was signed in October 1990. He and Sam signed it in Mr. Marshalek's office at 12 Monongahela Avenue. He then took the Agreement to his parent's home where Luigi Bossio signed it. Both the 1982 and 1990 Agreements were then placed in the manila folder and put in the safe.
20. David Straface testified that in 1990 he prepared a new stock purchase agreement for Bossio Enterprises. Plaintiff's Exhibit 6. However, he does not recall seeing a signed copy of that Agreement.
21. Attorney Straface testified that it would not be unusual for him to not receive a signed copy of the Agreement for his files.
22. Stock certificates of Bossio Enterprises, Inc. were issued to Sam Bossio, Bernard V. Bossio, and Louis Bossio. Each certificate stated the person named was the owner of ten (10) shares of stock in Bossio Enterprises, Inc. The certificates further stated that "This certificate is transferable only upon compliance with the provisions of an agreement dated 10-1-90, among Bossio Enterprises, Inc., Louis Bossio, Sam Bossio and Bernard Bossio, a copy of which is on file in the Office of the Secretary of the Corporation." Plaintiff's Exhibit 5.
23. On September 24, 1991, Mr. Marshalek made notes regarding the value of Bernard Bossio's shares of stock in connection with Bernard Bossio's divorce proceeding. These notes refer to "buy sell 100,000". Plaintiff's Exhibit 9.
24. Mr. Marshalek testified that he would not have made note of a "buy-sell" if one did not exist, but that he had no specific recollection regarding the execution or existence of a 1982 or 1990 buy sell Agreement.
25. Attorney Straface represented Bernard Bossio in his divorce. In his notes from the

divorce file, Mr. Straface found a reference to a buy-sell contract valued at \$750,000.00. Plaintiff's Exhibit 7.

26. In a letter from William Frame to David Straface, dated October 17, 1991, Mr. Frame requested a copy of "Buy / sell agreement for Bossio Enterprises". Plaintiff's Exhibit 9. Mr. Frame represented Bernard Bossio's wife, Laura, in their divorce. Mr. Straface could not recall whether a Buy/Sell Agreement was ever produced during the divorce action.
27. Sometime in 2008, Bernard Bossio discovered that the stock certificates and the Stock Purchase Agreements were no longer in the safe.
28. The stock certificates were produced by Defendant Sam Bossio as requested in discovery during the course of this lawsuit.
29. Neither the 1982 nor 1990 signed, original versions of the Stock Purchase Agreements have been located.
30. Plaintiff, Bernard Bossio, wants the 1990 Buy/Sell Agreement to be enforced.
31. The Defendants deny the existence of a signed and executed Buy/Sell Agreement and state that the Estate of Luigi Bossio is not bound to redeem its shares in the Corporation.
32. The Estate of Luigi Bossio does not deny that the Corporation owned three life insurance policies on the three shareholders from 1982 until they were cancelled in the 1990s.

Conclusions of Law

1. "Generally, a high degree of proof from one seeking to establish a lost instrument is required." Marshall v. Elmo Greer & Sons, Inc., 193 W.Va. 427, 429 (1995).
2. "When it is shown that an original writing containing facts relevant to the issues in a case is lost or destroyed secondary evidence of its contents becomes admissible." Syl. Pt. 1, State

ex rel. Alderson v. Holbert, 137 W.Va. 883 (1953).

3. The Court finds that the Plaintiff has proven that the parties intended to enter into an arrangement where upon the death of one of the shareholders of Bossio Enterprises, Inc., the Corporation would purchase the stock of the deceased shareholder.
4. The Court finds that the 1982 Stock Purchase Agreement was executed and remained in effect until the life insurance policies lapsed from failure to pay the premiums.
5. The Court further finds that the Stock Purchase Agreement was revised in 1990. The terms of the 1990 Agreement were identical to the 1982 Agreement with the exception of the requirement that the Corporation purchase policies of life insurance on the life of each shareholder.

Order

Accordingly, it is ORDERED that the stock purchase agreement is valid and binding upon all the parties in this matter. The terms and substance of this agreement are set forth in the document introduced as Plaintiff's Exhibit 2, with the exception of Section Three, Life Insurance.

The Court further directs the Clerk of the Circuit Court of Monongalia County to distribute certified copies of this Order to all counsel and/or parties of record.

Enter this 5th day of September 2014,



Russell M. Clawges, Jr., Judge
17th Judicial Circuit, Division II.

ENTERED Sept 5, 2014

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