THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT
Docket No. 04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc.,
Thomas M. Burke, Marie I. Burke,
and Bernardine P. Donelson

RESPONSE TO THE POST-TRIAL MEMORANDUM SUBMITTED BY MARIE I. BURKE AND BERNARDINE P. DONELSON

NOW COMES Plaintiff Edward J. Burke by and through his attorney, Vincent A. Wenners, Jr. Esq., and respectfully submits the following Response:

I. INTRODUCTION

The Defendants' Post-Trial Memorandum submitted by the defendants in this case contains several assumptions and errors that will be addressed point by point below.

II. ISSUES FOR REBUTTAL

A. Store ownership

The Defendants' Post-Trial Memorandum (Defendants' Memorandum) asserts in several places that the various members of the Burke family were not co-owners of the store prior to its incorporation in 1971. On page four (4) of the Memorandum it states, "Prior to the incorporation… Edward Burke, Bernardine Donelson and Thomas Burke were not owners of Bunny's Suprette." On page five (5), the Memorandum states that Marie Burke "…decided to gift a 25% interest in the business to each of her children," which implies that they were not already co-owners.

In fact, there was a long-standing oral agreement that everything would be shared equally among all the members of the family, and the corporation was formed as an expression of that intent. The children had worked in the store at various times without pay even though there was no "obligation and/or expectation" that they would work in the store. (Defendants' Memorandum, p. 3.) This work illustrates the oral agreement of shared ownership, since they would help the store build equity by working without salary when they had few expenses, and would take a salary after they moved out of their parent's house and had more expenses. (Defendants' Memorandum, p. 3 –4.)

When the family decided to incorporate in 1971, there is no evidence presented that the 25% shares allotted to each family member was a "gift." Instead, the incorporation merely formalized part of the equal-share oral agreement that already existed. There is no evidence of gift taxes paid, or even contemplated. Edward Burke was the one who approached the incorporating attorney, and he was the one who provided the attorney with the information necessary to incorporate. (Defendants' Memorandum, p. 5.) The very fact that the shares were distributed equally is evidence of the underlying agreement; if Marie had in fact had sole ownership, she could have incorporated the business to retain a controlling interest, or given the children non-voting shares, or one of several corporate structures other than even shares.

B. The Stock Transfer

The Defendants' Memorandum asserts that the Parole Evidence Rule should bar Edward Burke's attempt to avoid the written stock restriction. (Defendants' Memorandum, p. 14- 15.) If this Court finds that the transfer of stock was a gift, then such gift would violate the underlying agreement that all family members would share in the business equally. If this Court finds that the transfer of stock was a sale for consideration, then the restriction agreement must be enforced on its face, and the Corporation must be given the opportunity to buy those shares. Either way, the transfer violated the intent of the previous family agreements.

Even if the Court were to find that the stock transfers at issue were gifts, they would still violate the stock restriction. The Defendants' Memorandum admits that the stock restriction was entered into to "limit the ability of an outsider (i.e. individuals outside the family)" from buying an ownership in the store (Defendants' Memorandum, p. 5 - 6) and also admits that a court may use the "circumstances and context" in which a document is negotiated to interpret its terms if those terms are ambiguous. (Defendants' Memorandum, p. 11.) The context of this agreement was clearly to keep the ownership of the family business within the family. Allowing "gifts" would totally defeat this purpose.

The Defendants' Memorandum states that there is insufficient evidence to support a determination that the transfer of shares was not a gift due to consideration or as a result of undue influence. (Defendants' Memorandum, p. 12.) In fact, there is ample evidence for both consideration and undue influence. Both Bernardine Donelson and Thomas Burke testified that they had met with each other and with Marie Burke in the weeks before the transfer on April 1, 2004 and the First Amendment to the Trust on April 5, 2004. (Plaintiff's Memorandum, p. 30.) The Trust Amendment gave Bernardine Donelson the residue of the estate and the transfer gave control of the store to Thomas Burke. The Amendment was the consideration for the transfer.

C. Real Estate Assets

The Defendants' Memorandum claims that Edward Burke may not rely on statements made by Bernard Burke regarding ownership rights because of the Statute of Limitations. (Defendants' Memorandum, p. 13.) In fact, none of Edward Burke's assertions rely in any way on evidence that would be affected by this rule.

Edward Burke does not rely on statements made to him by Bernard Burke, nor is he making a claim against the estate of his father. Therefore the Statute of Limitations under RSA 556:5.5 (Defendants' Memorandum, p. 13) does not apply. Instead, Edward Burke seeks relief based upon the oral agreement that had always been in effect among the family members, namely that all the property be shared equally. Edward Burke had acted in reliance on this agreement throughout the many years that he worked to improve the family business, and his reliance makes that agreement enforceable.

D. Edward Burke's Entitlement to His Share of the Properties

The Defendants' Memorandum states that Edward Burke has failed to set forth "sufficient evidence to support a determination that he is entitled to any of the properties." (Defendants' Memorandum, p. 16) The Defendants base this entirely on their contention that the Statute of Frauds prevents an action maintained "upon a contract for the sale of land" without a written agreement. (Defendants' Memorandum, p.16-17.) The Statute of Frauds is wholly inapplicable here, because the case at bar is not an action upon a contract for sale.

Instead, this case is an action in equity, as there was never a sale of land that was contested. Edward Burke "admits that performance of services was not exchanged for ownership." (Defendants' Memorandum, p. 17.) Since there was no exchange of ownership, the

Statute of Frauds does n t apply. Instead, the performance of services was done in reliance on the oral agreement, in fu therance of the shared assets of the family business. The family had always acted as though ll members had an equal share in the family's assets, and Edward Burke relied on this agreemen for his whole working life. This reliance makes the oral agreement enforceable.

III. CONCLUSION

The transfer of ares and real estate from Marie Burke to Thomas Burke and the execution of a will and evocable trust (and the transfer of real estate to that trust) by Marie Burke were breaches o he terms of the oral agreement and the result of the undue influence of Thomas Burke. When e disposition of a will and its "pourover" trust is unreasonable or unjust, a court may find evide of undue influence sufficient to compel restitution of transferred property. (Plaintiff's I -Trial Memorandum, p. 25, citing Curtice v. Dixon, 74 N.H. 386 (1907)). Here, the tran r was clearly unjust in light of the many years of family agreement that the family business wa o be owned equally by all members of the family. Thomas Burke controlled all financial spects of his mother's life: he wrote all her checks and paid all her expenses; he arranged r the will and trust to be drafted; he drove her to a lawyer to draft a will and trust and to sign th will and trust and he paid the lawyer's bill for the will and trust; he reviewed every "impo t document" for her and advised her what to sign. At trial Marie Burke was unable to articula er "estate plan," and she was not even able to identify the documents that she had signed, le ne understand their import. Thomas Burke participated in all estate planning discussions. Defendant concedes it did not produce witnesses to refute allegations of undue influence, y such witnesses were available including Marie Burke's entire family, Attorney Lamontagne, and Attorney Ansell. The Defendants' Memorandum merely states, "there was also no evidence to prove… undue influence. (Defendants' Memorandum, p. 12.) In fact, undue influence was shown, and therefore the will and trust should be found invalid. (Plaintiff's Memorandum, p, 25, citing Edgerly v. Edgerly, 73 N.H. 407, 408 (1905)).

The Plaintiff has demonstrated by ample evidence that he acted in reliance on the family agreement for many years, and that this reliance makes that oral agreement enforceable. The deeds, will, and trust executed by Marie Burke were clear breaches or anticipatory breaches of the agreement, and the breaches were the direct result of the undue influence of the Defendant Thomas Burke superimposing his will and desires upon and overcoming the will and free choice of Marie Burke.

Therefore, the Plaintiff asks that this Court order specific performance of that agreement as well as that ancillary relief to specific performance requested in his Post-Trial Memorandum.

Respectfully submitted:
Edward J. Burke
By his Attorney,

Dated: July 7, 2005

____

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CERTIFICATION

I hereby certify that a copy of the within Memorandum of Law has this date been forwarded to James A. Normand, Esquire, Ovide Lamontagne, Esquire, Danielle Pacik, Esquire and Ruth Tolf Ansell, Esquire, opposing counsel.

Dated: July 7, 2005

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THE STATE OF NEW HAMPSHIRE
Northern District of Hillsborough County
300 Chestnut Street
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NOTICE OF DECISION

OVIDE M LAMONTAGNE ESQ
DEVINE MILLIMET & BRANCH
111 AMHERST ST PO BOX 719
MANCHESTER NH 03105

04-E-0251 Edward J. Burke, et al v. Bunny's Superette, Inc., et al

Enclosed please find a copy of the Court's Order dated 8/23/2005 relative to:

Final Order

08/23/2005

John Safford
Clerk of Court

cc: Vincent A Wenners, Jr., Esq.
James A Normand, Esq.
Ruth Ansell, Esq.
Danielle L. Pacik, Esq.

AOC Form SUCP050 (Rev. 09/27/2001)

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

DOCKET NO. 04-E-251

EDWARD J. BURKE

v.

BUNNY'S SUPERETTE, INC.,
THOMAS M. BURKE, MARIE I. BURKE,
AND BERNADINE P. DONELSON

ORDER

The Petitioner, Edward J. Burke ("Edward"), brings this action against his mother, Marie I. Burke ("Marie"), his two siblings, Thomas M. Burke ("Thomas") and Bernadine P. Donelson ("Bernadine"), and Bunny's Superette, Inc. ("Bunny's"), seeking broad relief in connection with rights and interests he claims under a purported oral agreement. Edward avers that many years ago, when he and his siblings still lived with their parents, a verbal agreement or understanding was reached among all concerned family members that all family members would equally own the family business and other accumulated property. In this regard, Edward asserts that, under this agreement, with the death of the two parents, the siblings would come to equally own said assets. Edward further avers that this original oral agreement or understanding was reaffirmed by the individual respondents upon the death of his father, Bernard Burke ("Bernard"), in

1971, that he fulfilled his obligations under the agreement and fully relied on it, and that the individual respondents have taken actions since about 1999 to wrongfully deprive him of his contract-based rights. In this regard, Edward particularly challenges: (1) Marie's creation of a will and revocable trust in 1999 and her conveyance of certain property into the trust; (2) Marie's later trust-related actions in 2004 to further limit his claimed property entitlements, including her conveyance, through the trust, of both stock in Bunny's and certain real properties to Thomas; and (3) Bernadine's conveyance of her stock in Bunny's to Thomas in 2004 at about the same time her mother conveyed hers through the trust. Edward also asserts that Thomas has been guilty of exerting undue influence over Marie to have her take action against him, that he has violated a claimed "fiduciary duty of a de facto attorney," and that he has violated the Uniform Fraudulent Transfer Act, RSA Chapter 545-A. Finally, he claims that Thomas is proceeding, or has proceeded, particularly through corporate special meetings relative to Bunny's, in ways which are contrary to, and violative of, his contract-based rights.

The individual respondents vigorously oppose Edward's contentions. They assert that no oral agreement, as suggested by Edward, was ever in place, and they contend, among other things, that they have acted properly and within their rights relative to pertinent inheritance and property interests herein.

The Respondent, Bunny's, also opposes Edward's case, and has also interposed a counterclaim, contending that Edward has failed to repay certain indebtedness due the corporation.

A trial occurred over two days - - June 15 and June 16, 2005. During the trial, the Court received testimony from several witnesses, either live or through videotaped deposition, and also received a number of exhibits into evidence. The Court, thereafter, was also provided post-trial memoranda.

Upon consideration of the pertinent evidence, and the arguments presented, the Court finds and rules as follows.

I Background

Bernard, with his wife Marie, established a food business in the early 1950's. The principal food market, known as Bunny's Superette, came to be located on Webster Street, Manchester, New Hampshire. When the food business began, the three children, Bernadine, Edward and Thomas were, respectively, about 12, 10 and 6 years of age. The business was unquestionably considered a family business, and the Burke siblings worked in it throughout their childhood without pay. Nonetheless, their parents retained full control (legal and otherwise) of the business. They made all pertinent decisions, and retained full control of business finances and operations. The children were provided with all necessities and were given spending money and use of the family vehicle or vehicles. They had friends, engaged in sports and extracurricular activities, and were encouraged by their parents to go to college after high school.

After graduation from high school, all of the siblings continued, at least for a time, to work in the family food business, either part time or full time. However, only Edward continued without interruption to work in the business.

Both Bernadine and Thomas attended college, and received financial support from their parents. Bernadine went on to, among other things, teach for several years, and to marry. She did not return to work at the family food store except on a sporadic basis. Thomas, for his part, went into the military after college where he served for several years. He came to return to work in New Hampshire in the late 1960's, and came to return to work in the family food business. When he did this, he received from his parents a salary for his work.

As stated previously, Edward remained in the family business and did not go to college. He continued to work particularly with his father and continued to work for a time with no salary. During this period, however, his parents paid for his living expenses, provided him spending money, and gave him use of the family vehicle or vehicles. Moreover, when the Petitioner married in about 1966, he moved out of his parents' home and came to receive a salary for his work efforts.

There is no question that Edward worked hard and constructively in the family business. He was deeply attached to his father. Indeed, at trial he testified that the time working with his father were "the best years of his life." Certainly, as well, Edward considered himself to be an important contributor to the family business. Nevertheless, and whatever his subjective views were in this regard, Edward has here failed to show that any contract or understanding agreed to by all concerned (including his mother) was ever entered into so that he and his siblings were afforded some enforceable form of ownership interest in the family business and in the other properties owned by their parents. To the