

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 09-14-2012, 09-25-2012
Motion Submit Date: 09-25-2012
Motion Sequence No.: 001 MG
002 MD
003 MG
004 MG
005 MG

FINAL
 NON FINAL

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**GARY RUBIO, individually and derivatively on behalf of
SMITHTOWN NISSAN,**

Plaintiff,

-against-

**THOMAS RUBIO, individually, BERMAN, SOSMAN &
ROSENZIG, LLC., MARK R. GREENBAUM, individually,
SOLOMON RICHMAN P.C., CRAIG FINA, JOHN DOES 1-20,**

Defendants.

_____ X

In this Shareholder’s Derivative action, the Court is faced with three motions to dismiss the claims asserted , essentially based upon documentary evidence demonstrating that the Plaintiff lacks standing to bring this lawsuit as well the doctrine of judicial estoppel, relying upon prior sworn statements by Plaintiff in another lawsuit before the Suffolk County Supreme Court (Asher, J). Plaintiff opposes all three motions, presenting his own documentary evidence in support of his position. In addition, Plaintiff seeks broad preliminary injunctive relief in connection with his allegations of corporate waste and improper diversion of corporate assets and Defendant, Thomas Rubio seeks to enjoin Plaintiff from the ability to utilize corporate funds in this action for the

payment of his attorneys' fees. Defendants Thomas Rubio and Craig Fina oppose Plaintiff's application for injunctive relief and Plaintiff, Gary Rubio, opposes Thomas Rubio's motion to enjoin his use of corporate funds for payment of counsel fees. In the context of these various motions, both sides seek sanctions against each other on the ground that the positions each side has taken are frivolous.

Plaintiff, Gary Rubio's August 22, 2012 Complaint seeks, inter alia: 1) an accounting for misappropriation of corporate assets; 2) the imposition of a constructive trust on such misappropriated assets; 3) an injunction prohibiting transferring property in which the corporation has an interest; 4) money damages against Defendant Thomas Rubio for breach of fiduciary duty, by usurping corporate opportunities, and unjust enrichment; 5) money damages against the corporation's attorneys and accountants for professional malpractice in performance of their duties for the subject corporation; 6) money damages against Thomas Rubio and Craig Fina for conversion of corporate assets; and 7) money damages against all the named Defendants for fraud against the corporation. Plaintiff, Gary Rubio, brings all of these causes of action on behalf of a corporation, Smithtown Nissan, Inc., based upon his assertion that he "(o)wns twenty five (25%) percent of the stock of the Corporation".

Thomas Rubio moves to dismiss the complaint of his brother, Gary Rubio, pursuant to *CPLR* §§ 3211 (a)(1) and (3) (motion sequence #001); Craig Fina moves to dismiss the complaint pursuant to *CPLR* §§ 3211 (a) (1), (3) and (7) (motion sequence # 003); and Defendants Solomon Richman P. C. and Theodore Richman P. C. move to dismiss the complaint pursuant to *CPLR* §§ 3211 (a) (1) and (3). In support of these motions, each of the above named defendants provide the Court with a Purchase and Sale Agreement, dated October 7, 2009, which states that Gary A. Rubio, owner of 24.5% of the stock in Smithtown Nissan Inc., is selling his rights title and interest in such corporation for the sum of \$188,509.97; that the receipt of such funds is acknowledged by Gary Rubio by virtue of the fact that the Purchaser, Plaintiff's father, Joseph O. Rubio, has previously deposited such funds in Gary Rubio's TD Bank home equity loan Account No 1361255493; and that upon execution of the document, Gary Rubio will transfer to the Purchaser (his father) all of his stock certificates in Smithtown Nissan, Inc., as well as all benefits incumbent upon the Seller by virtue of his ownership in the corporation. The document submitted was fully executed on October

7, 2009.

In response to the documentary evidence, Gary Rubio submitted an Affidavit in which he claimed that although he had contemplated this transfer in order to raise funds in 2009 since he was in the midst of a divorce, the transfer was never consummated. Plaintiff sets forth that Defendants were aware of this fact because co-Defendant, Theodore Richman, Esq, counsel to Thomas Rubio and Joseph Rubio, so stated in a letter dated November 22, 2011 with regard to a lawsuit brought by Gary Rubio's ex-wife, Jennifer Giannelli, against Gary Rubio, Joseph Rubio and Smithtown Nissan, Inc, seeking to set aside the October 2009 transfer. In such letter, Thomas Richman Esq advises his client not to state that a transfer of Gary Rubio's interest had in fact occurred, since such would constitute perjury. Based upon these writings, Gary Rubio seeks sanctions against Thomas Rubio as well as the Richman Defendants for filing a frivolous motion. Gary Rubio also refers to 2009 and 2010 corporate tax returns for Smithtown Nissan, Inc, which set forth that Gary Rubio is a 25% shareholder of the corporation. Gary Rubio also asks for sanctions against Fina based upon the fact that Fina has claimed that Gary Rubio is liable to Fina for alleged violations of New York Labor Law § 198-a and that such could only be possible if Gary Rubio were a shareholder of Fina's former employer, Smithtown Nissan.

In response, the moving Defendants attach the complaint in the action by Gary Rubio's ex wife which states that at his deposition on April 14, 2010, Gary Rubio testified that he had sold his 24.5% interest in the corporation to his father for the sum of \$188,509.97, pursuant to the October 7, 2009 Purchase and Sale Agreement. In his verified answer to that complaint, dated May 11, 2011, Gary Rubio made the following sworn statements: "Defendant Gary Rubio . . . transferred his 24.5% interest in Smithtown Nissan Inc . . . to Joseph O. Rubio . . . in exchange for Joseph O. Rubio's payment of the then existing mortgage of \$188,509.97 on Plaintiff's house Said transfer of Gary R.'s 24.5 % interest in the Corporation was done in order to satisfy Gary R.'s obligation to pay off the Plaintiff's mortgage on the Plaintiff's Florida house. . . . Upon Gary R.'s transfer of his 24.5% interest in the Corporation to Joseph R, Joseph R, in consideration of said transfer, took a home equity loan on his house and used the proceeds of said loan to pay off the Plaintiff's mortgage of \$188,509.97. . . . Accordingly, the transfer was not done with any fraudulent intentions, but was done for the Plaintiff's benefit"

In addition, the counsel for Defendants Solomon Richman P.C. and Theodore Richman, P.C. cross moved to dismiss Gary Rubio's complaint on the same basis as their co-defendants, setting forth that any advice rendered by the Richman Defendants to Joseph Rubio is irrelevant in light of the numerous sworn statements by Gary Rubio in the Giannelli action, which was ultimately settled followed by a so-ordered Stipulation of Settlement. It is the position of the Solomon Defendants that Gary Rubio clearly took the position in the Giannelli action that he was not a shareholder of Smithtown Nissan, Inc in order to prevent avoidance of the October 2009 transfer and to prevent Gary Rubio's ex-wife, Giannelli, from execution a judgment against Gary Rubio's assets upon Smithtown Nissan. The Solomon Defendants annex a copy of both the Stipulation of Settlement and the allocution of the parties in the Giannelli action before Justice Asher, following which the court so-ordered the Stipulation. It is the Defendants' position that so-ordering of the agreement, which occurred on June 13, 2012, constitutes an inferential endorsement of Giannelli's position in that action, satisfying the "prior success" element necessary to enforce the defense of judicial estoppel. In essence, they argue that the Asher Court would never have accepted a settlement providing for discontinuance of Giannelli's action against Smithtown Nissan, Inc and limiting the Plaintiff's relief to weekly payments from Gary Rubio as an employee of Smithtown Nissan, if it had any inkling that Gary Rubio was still a shareholder of that entity.

In response to the Solomon cross-motion, Plaintiff submits the affidavit of an attorney, Martin G Margolis, Esq., who took over the defense of the Giannelli action from the Solomon defendants, and represented Joseph Rubio and Smithtown Nissan, Inc., in the settlement of that action. Martin Margolis avers that the settlement was not procured nor accomplished as a result of any position that Gary Rubio took in the context of his matrimonial dispute; but, rather as a result of the agreement by Joseph Rubio and the corporation agreeing that Gary Rubio would remain an employee at Smithtown Nissan during a 170 week period, during which his earnings from Smithtown Nissan, Inc., would be paid in the amount of \$1000 per week. He also states that on November 2011, Joseph Rubio effectuated gift transfers of 1/3 of his non-voting stock to Gary Rubio and attaches the Deed of Gift to his papers.

Counsel for the Solomon Defendants argues in response that the Giannelli action was still ongoing for a lengthy period following the alleged transfer and, yet, there is no statement by Gary Rubio in that action, telling the parties, nor, indeed the court in that action, that he had again become a shareholder of Smithtown Nissan. Interestingly, this transfer is neither mentioned in Gary Rubio's affidavit in support of his motion for a Preliminary Injunction and, indeed, contradicted by his affidavit, dated September 4, 2012, in which he states to this Court that his father is a 50% shareholder of the corporation, while he and his brother, Thomas Rubio are both 25% shareholders. In addition, counsel for the Solomon Defendants asserts that there is no allegation by Plaintiff that any of the so-called wrongs committed against the corporation occurred after the alleged gift of November 2011. Defendant Thomas Rubio's counsel argues that the Margolis claim is completely inconsistent with Gary Rubio's pleadings and affidavits in this case, and that no such transfer occurred.

With regard to Plaintiff's application for sanctions against Fina, that Defendant's counsel states that his client's claim against Gary Rubio pursuant to the Fair Labor Standards Act and the New York Labor Law are not predicated upon Plaintiff's shareholder status; but, rather the statutory requirement that he had the power to hire and fire employees as well as supervised their work and maintained employment records, citing *Herman v RSR Sec Servs Ltd*, 172 F 3d 132, 139 (2d Cir 1999). Thus Fina's counsel believes he has the right to seek sanctions against Plaintiff. Plaintiff's counsel disagrees with that interpretation of the law.

In his motion for a Preliminary Injunction (motion sequence # 002), Gary Rubio seeks broad injunctive relief, including: 1) restraining Thomas Rubio as well as his other entities, including Performance Auto Inc, affiliates and assigns, from diverting the assets and revenues of Smithtown Nissan, Inc, from receiving compensation from the corporation and certain other entities, and from transacting the business of such corporation without the Plaintiff's consent; 2) restraining Thomas Rubio from utilizing trade names, website domain names and the like created during the period he managed the corporation; 3) compelling an accounting of all automobile sales and service records for Performance Auto and its affiliates; 4) compelling Thomas Rubio to escrow with the court all automobile sales and service income from Performance Auto and its affiliates; 5) compelling Thomas Rubio to provide plaintiff with access to all trade names, website domain names, accounts and consumer retain website that were created during the time Thomas Rubio manages the

corporation; 6) restraining Thomas Rubio from removing altering or destroying and of the books and records of the corporation; 7) compelling Thomas Rubio to make available for inspection all books and records of the corporation; 8) restraining Craig Fina from communicating with the employees of the corporation in a manner that would be expected to cause them to terminate their employment with the corporation; and 9) restraining Craig Fina from solicitation of the corporation's customers through the use of its customer lists and from using and/or disseminating such confidential information.

In support of this motion, Gary Rubio sets forth that Thomas Rubio, who controlled the dealership until his ouster several months ago by vote of Gary Rubio and Joseph Rubio, formed and operated various businesses, including Performance Auto Electronics, Inc., and Performance Body Shop, Inc., to divert corporate opportunities and profits for his own use and benefit to the detriment of Smithtown Nissan Inc., as well as to waste corporate assets. It is his claim that these outside entities sold Smithtown Nissan extended warranties on vehicles that it sold to the corporation's retail customers; sold Smithtown Nissan certain aftermarket electronic automotive goods and services; provided structure and body work to motor vehicles owned by Smithtown Nissan and/or its customers; and utilized the profits from these ventures for his personal use and benefit. Gary Rubio alleges, in addition, that Thomas Rubio created and registered trade names, website domain names accounts with advertising and consumer retail websites, such as Cars.com and Aurotrader.com in his own personal name, all of which should really belong to the corporation. Yet, allegedly Thomas Rubio has refused Plaintiff access to all the corporation's computer data. With regard to Defendant, Craig Fina, Gary Rubio asserts that he had been employed by the corporation as general sales manager and had access to Smithtown Nissan's confidential customer lists and information, but that after his termination, he began working for a direct competitor of the corporation and converted such confidential information to solicit Smithtown Nissan's customers for the use and benefit of his new employer.

Gary Rubio argues that he has satisfied the test of probability of success on the merits based on these allegations and that the equities balance in his favor because if his injunctive relief is not granted by the Court, any money judgment will be rendered meaningless.

In opposition to Plaintiff's application for preliminary injunctive relief, Thomas Rubio

submits an affidavit in which he sets forth that every entity that he now owns was created with Gary Rubio or with his father, Joseph Rubio's (majority shareholder of Smithtown Nissan) consent. He avers that the real property adjacent to the corporation was purchased by an entity formed by him and Gary Rubio, Rubio Realty LLC and that the entity leased the property to the corporation; however, when Gary Rubio was in financial straits, he requested that Thomas Rubio purchase his share for approximately \$350,000. As the purchase mortgage has now been satisfied, the corporation no longer pays rent for that real property. He sets forth that with the consent of Joseph Rubio, as majority shareholder of Smithtown Nissan, he purchased land adjacent to that of Rubio Realty by creating 527 Middle Country Road, LLC, advanced the down payment and financed the balance. With the consent of Joseph Rubio, that LLC has leased the property to the corporation. He states further that from 1989 through 2006, the corporation owned and operated a body shop to serve its customers. In 2006, Joseph Rubio gifted that body shop to Plaintiff Gary Rubio. However, again Gary Rubio found himself in financial trouble in 2009 and asked Thomas Rubio to take over the body shop, Performance Automotive Group Inc. Thomas Rubio has done so and has in conjunction with the corporation, paid off all of its outstanding obligations save unpaid sales and payroll tax, for which he remains personally liable. The other corporation which Gary Rubio complained about, Performance Auto Electronics, Inc., was also formed by him with Joseph Rubio's consent. This entity permits an individual, who was capable of inserting remote start systems, to perform such tasks as they are offered to the corporation's customers by the corporation which does not perform such installations. All sums, based on the reasonable amounts provided by the corporation for the service, except for less than \$10,000 per year, earned by that entity, are utilized to purchase parts and pay the salaries of those employed by the entity. The final entity, with which Thomas Rubio has an interest, Portfolio General Management Inc, provides Smithtown Nissan with work it would not otherwise be permitted to perform by assuring that 95% to 97% of covered warranty work is provided by the corporation's own service department. Thomas Rubio avers that he established TC Auto Limited for the purpose of servicing Smithtown's warranty customers; it is TC that sells warranties to the corporation's customers. He states finally that he has never utilized parts from Smithtown Nissan without paying therefor; has always utilized Smithtown Nissan's parts for any repairs and always paid his account in full. Accordingly, Thomas Rubio argues there is no basis set forth for any injunctive relief against him.

Craig Fina also asserts that Gary Rubio has set forth no basis for the injunctive relief sought

against him. Thus, he states that: 1) he never signed any agreements during his employment with Smithtown Nissan Inc. restricting his ability to solicit either employees or customers of the corporation following termination of his employment; 2) Smithtown Nissan used direct mailing advertising to solicit its customers and advertising agencies during his employment and continuing today to purchase information from third parties regarding the price of car leases due to expire within six months that are accessible to all dealers; and 3) Fina took no nor possesses any documents from Smithtown Nissan. Fina submits affidavits from management employees of two direct mail advertising agencies, each of whom explains that they purchase information related to individuals who lease and own automobiles, including lease expiration dates and sell such information to automobile dealers, such as the one currently employing Craig Fina.

Finally, Thomas Rubio moves, by Notice of Cross-Motion (motion sequence #004) , for an order pursuant to CPLR § 6301, enjoining the Plaintiff and anyone acting on his behalf, pending the action, from directly or indirectly utilizing any funds of Smithtown Nissan Inc. for the payment of fees and expenses to the attorneys appearing for Plaintiff in this case. Thomas Rubio argues both that Plaintiff cannot utilize corporate funds for this purpose as he is not a shareholder and has no standing to bring the derivative action and because *BCL § 626* only authorizes payment of legal fees in a derivative action if the plaintiff is successful at securing recovery for the corporation. Gary Rubio argues, in opposition, as in his opposition to the motions to dismiss his action, that he is and always has been a shareholder as is evident from the statement of former attorneys for Joseph Rubio and the corporate tax returns.

Under New York law, only those persons or entities that are shareholders at the time they commence a derivative action, have standing to bring such action on behalf of the corporate entity. Thus, *Business Corporation Law § 626* provides that:

“(a) An action may be brought in the right of a domestic. . . . corporation to procure a judgment in its favor, by a holder of shares of the corporation. . . .

(b) In any such action, it shall be made to appear that the plaintiff is such a holder at the time of the bringing of the action and that he was such a holder at the time of the transaction of which he complains. . . .”.

Each and every one of the Plaintiff's claims in this lawsuit are premised upon his status as a shareholder of Smithtown Nissan, Inc.

As this Court previously stated in the case of *Watkins v JC Land Dev. Ltd.*, NYLJ, Jun. 26, 2009 at 38, col. 3 :

“The well recognized doctrine of judicial estoppel is designed to protect the integrity of the court system as a whole by prohibiting deliberate alteration of a stated position before the same or different courts in order to obtain favorable treatment. *New Hampshire v Maine*, 532 US 742 (2001); *Festinger v Edrich*, 32 AD 3d 412 (2nd Dep't 2006). The doctrine prohibits a party who, having obtained a favorable ruling based upon an asserted position, seeks to alter the position simply because the litigant's interests have changed. *Jones Lang Wooten USA v Leboeuf, Lamb, Greene & MacRae*, 243 AD 2d 168 (1st Dep't 1998) leave to appeal dismissed, 92 NY 2d 962 (1998)”.

There is no question that what occurred in *Watkins, supra*, is akin to the scenario set forth before the Court in the case at bar. Faced with a litigation commenced by his ex spouse, that Gary Rubio had transferred his stock in Smithtown Nissan, Inc in 2009, in violation of the Debtor and Creditor law, in order to avoid his obligations under the settlement of his matrimonial action, Gary Rubio, both in sworn testimony and in verified pleadings before this Court's colleague, Justice Gerald Asher, stated that he had, indeed, transferred all of his shares of such entity to his father, Joseph Rubio, in exchange for \$188,509.87, which sum he utilized to make mortgage payments on the marital residence. Gary Rubio appended, in the pleadings before that Court, both a copy of the canceled check demonstrating that he had received and utilized the funds and a copy of the 2009 stock transfer agreement. Now the same party states under oath before this Court that the transfer never occurred.

Gary Rubio's assertions that his statements do not fall within the judicial estoppel purview, since the litigation by his ex-wife terminated in settlement as opposed to judgment are misplaced. First, the settlement was approved by Justice Asher on the record; second, it is clear from the total record in that case, that there was no dispute and indeed that both parties before Justice Asher submitted sworn statements in the action before that jurist that Gary Rubio had transferred all his shares in the corporation that is the subject of this lawsuit and was not an owner of the corporation

at the time he appeared before Justice Asher and settled his ex-wife's claim of over \$568,761.11 for approximately \$200,000.00. The combination of the sworn pleadings and the deposition testimony by Gary Rubio in connection with the Giannelli action, were part of the record before another court of coordinate jurisdiction. With regard to the statements by Thomas Richman, Esq, to his client, Joseph Rubio, they are irrelevant, as they were never brought before the Court in that action and because they are directly contradicted by the person seeking approval of the settlement before Justice Asher and seeking relief before this Court, upon totally contradictory bases. Indeed, the settlement of that matter before Justice Asher, in June 2012, allows the discontinuance of Ms. Giannelli's action against the corporation, Smithtown Nissan, Inc, which she sued. There is no rational basis on which such could have occurred if Gary Rubio was still a shareholder of that entity when the stipulation was presented to the Court.

The court is not unmindful of the issue of the 2010 corporate tax return. However, as damaging as that may appear and, in this Court's opinion it should be corrected, it was not presented to a court in order to avoid a specific action, i.e. the invasion of corporate assets by the ex spouse of Gary Rubio.

Since the doctrine of judicial estoppel clearly applies to the case and prevents the Plaintiff, Gary Rubio, from asserting that he is a shareholder of Smithtown Nissan, Inc., he lacks standing to bring an action, incorporating any of the causes of action set forth in his complaint as each and every one of them is brought both on behalf of the corporation and is premised upon Gary Rubio's status as a shareholder of such entity. Accordingly, the motions of Thomas Rubio, Craig Fina as well as the Richman Defendants to dismiss this action are granted. Based upon the above , there exists no cause of action against Defendants Greenbaum and Berman, Sosman & Rosenzweig LLC as those causes of action are based solely upon alleged aiding and abetting the other parties, against whom the action has been dismissed.

As the Court has dismissed Plaintiff's action, Plaintiff's motion for Preliminary Injunctive relief is denied as moot and Defendant Craig Fina's motion to prohibit Gary Rubio from use of corporate funds for attorneys' fees is granted. All applications for sanctions are, in the Court's discretion, denied. This constitutes the *DECISION* and *ORDER* of the Court.

Dated: November 26, 2012
Riverhead, New York

EMILY PINES
J. S. C.

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