

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 6/1/06

Submission Date: 7/14/06

Motion Sequence No.: 001/MOT D

JERYL GLASER,

Plaintiff,

COUNSEL FOR PLAINTIFF

**Ackerman, Levine, Cullen, Brickman
& Limmer, LLP**

**175 Great Neck Road
Great Neck, NY 11021**

- against -

**JOHN N. KRATZ and STEVEN S.
GLASER,**

Defendants.

COUNSEL FOR DEFENDANT

**Hession, Beckoff & Cooper, LLP
1103 Stewart Avenue
Garden City, NY 11530**

ORDER

The following papers were read on Defendants' motion to dismiss this action or stay this action and compel arbitration:

Notice of motion dated May 1, 2006;
Affirmation of Andrew Paul Cooper, Esq. dated May 1, 2006;
Affidavit of John N. Kratz sworn to on April 26, 2006;
Affidavit of Jeryl Glaser sworn to June 15, 2006;
Affidavit of David Glaser sworn to June 15, 2006;
Plaintiff's memorandum of law;
Reply Affidavit of John N. Kratz sworn to on July 13, 2006;
Defendants' reply memorandum of law.

Defendants move to dismiss this action on the grounds that (1) the Court lacks personal jurisdiction over the Defendant John N. Kratz; (2) Plaintiff has failed to join a

necessary party; (3) *forum non conveniens*; and (4) Plaintiff lacks standing or capacity to sue. Alternatively, Defendants move to stay this action and compel arbitration.

BACKGROUND

Plaintiff, Jeryl Glaser (“Jeryl”), is the owner of 25% of the shares of Information Control Corporation (“ICC”). Defendant, John Kratz (“Kratz”), is the owner of 50% of the shares of ICC. Kratz is president of ICC. Susan Glaser (“Susan”), who is not a party to this action, owns the other 25% of the shares of ICC. Defendant, Steven S. Glaser (“Steven”), Susan’s husband, is the Chief Financial Officer of ICC.

ICC is a corporation organized and existing pursuant to the laws of the state of Ohio. ICC’s principal place of business is located in Columbus, Ohio. ICC is not a foreign corporation authorized to do business in New York . See, Business Corporation Law Article 13.

The complaint alleges Kratz and Steven have exercised full control over the business operations of ICC. In so doing, Plaintiff alleges that Kratz and Steven (1) have paid themselves compensation in excess of what would be fair and reasonable compensation for the services rendered to ICC; (2) paid dividends or made distributions to shareholders when ICC did not have sufficient funds to make such payments; (3) borrowed money to pay dividends; (4) paid Jeryl dividends or distributions that were not equal on a per share basis to the dividends made or distributions made to the other shareholders; (5) paid Steven’s personal expenses from corporate funds; (6) paid Susan compensation even though she did not render any service to ICC; and (7) from

2001 through March or April 2004, paid Steven as a full-time employee of ICC even though he was working for ICC on a part-time basis.

Based upon these allegations, Plaintiff seeks to recover damages for breach of fiduciary duty, unjust enrichment and conversion.

DISCUSSION

A. Shareholder Derivative Claim

Defendants seek to dismiss this action asserting that Plaintiff lacks standing to bring the action because the action must be brought as a shareholder derivative action.

Jeryl asserts that since ICC is an Ohio corporation her rights should be governed by Ohio law. ICC is an Ohio corporation. Therefore, issues relating to the internal management and the duty owed by shareholders to each other must be governed by Ohio law.

The majority or controlling shareholders of a corporation owe a fiduciary duty to the minority shareholders of that corporation. Crosby v. Beam, 47 Ohio St.3d 105 (1989). Ohio permits a minority shareholder in a close corporation to sue the majority or controlling shareholders for breach of fiduciary duty when the harm to the minority shareholder is individual in nature. *Id.* To maintain such an action, the minority shareholder must establish the injuries he or she sustained are separate and distinct from the injuries sustained by the corporation. *Id.*; and Palmer v. Fox Software, Inc., 107 F.3d 415 (6th Cir. 1997); and DeHoff v. Veterinary Hospital Operations of Central Ohio, 2003 WL 21470388 (Ohio App. 10th Dist. 2003).

Thus, the Court must address two issues. They are: (1) is Kratz a majority or controlling shareholders; and (2) are the damages sustained by Jeryl separate and apart from those sustained by the corporation.

Kratz is not a majority shareholder. He owns only 50% of the shares of ICC. However, at least at this stage, there is sufficient material before the Court to conclude that he is a controlling shareholder. One is a controlling shareholder even when one does not own a majority of the shares when one's actions control or dominate corporate activity and decision making and the normal corporate governing formalities were not observed. McLaughlin v. Beeghly, 84 Ohio App.3d 502 (10th Dist. 1992). The Close Corporation Agreement establishes Kratz as the controlling shareholder. Paragraph 6 of that agreement grants Kratz as president "...the sole authority to oversee and conduct the Company's day-to-day business operations." Kratz' sole obligation regarding this authority is to apprise Jeryl and Steven, as Susan's representative, of ICC's operations. This paragraph further provides that decisions outside the scope of normal day-to-day operations which involve the expenditure or commitment of significant corporate resources or which will cause the ICC to incur significant debt shall be made upon the mutual consent of Kratz and Steven.

The Ohio courts have liberally construed what constitutes individual -- as opposed to corporate -- damage. Claims that a corporation has paid exorbitant salaries to the majority or controlling shareholders, paid personal expenses from corporate funds or engaged in activities that spent corporate assets in an improper manner

thereby depriving the corporation of funds which could be used to pay dividends or distributions to the minority shareholder have, for pleading purposes, been held to constitute individual damage permitting the minority shareholder to sue directly rather than in a shareholder derivative action. See, Crosby v. Beam, *supra*.

For the foregoing reasons, Jeryl may maintain this action individually.

B. CPLR 327 - Forum non Conveniens

CPLR 327(a) permits the court to stay or dismiss an action in the interest of substantial justice the action should be heard in another forum. Under CPLR 327(a) and the common law doctrine of *forum non conveniens*, the court may dismiss an action over which it would have jurisdiction if it would be better adjudicated in another jurisdiction. Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474 (1984), *cert. den.*, 469 U.S. 1108 (1985).¹

The party seeking dismissal on this grounds must establish that the selection of New York as the venue will not serve the interests of substantial justice. Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust Ltd., 62 N.Y.2d 65 (1984); Yoshida Printing Co., Inc. v. Aiba, 213 A.D.2d 275 (1st Dept. 1995); and Stamm v. Deloitte and Touche, 202 A.D.2d 413 (2nd Dept. 1994).

¹For the purposes of CPLR 327(a), the court must assume that it has personal jurisdiction over Kratz. Kratz has moved to dismiss this action on the grounds that he is not subject to the personal jurisdiction of the New York courts. Since the Court is dismissing this action pursuant to CPLR 327, it need not decide the issue of whether Kratz is subject its personal jurisdiction.

The fact that one or more of the parties is a resident of New York does not preclude dismissal. Silver v. Great American Ins. Co., 29 N.Y.2d 356 (1972). The courts of New York are not compelled to retain jurisdiction over an action that does not have a substantial nexus to New York. Cheggour v. R’Kiki, 293 A.D.2d 507 (2nd Dept. 2002); and Wentzel v. Allen Machinery, Inc., 277 A.D.2d 446 (2nd Dept. 2000).

The court must consider and weigh several factors including the difficulties to the defendant in litigating the action in New York, the burden on New York courts in hearing the action, the availability of another more convenient forum in which to litigate the action, the residence of the parties and whether the cause of action arose out a transaction that occurred in another jurisdiction. Islamic Republic of Iran v. Pahlavi, *supra.*; and Wentzel v. Allen Machinery, Inc., *supra.*

Taking these factors into account, this Court believes that this action should be dismissed. Notwithstanding the fact that the sole nexus this action has to New York is that Jeryl and Steven are New York residents, the transactions which give rise to this action took place in Ohio.

This action arises out of the alleged breaches of fiduciary duty owed by the majority or controlling shareholders of an Ohio corporation to its minority shareholder. In this regard, the laws of Ohio and the New York are quite different. While, Ohio permits a direct action by the shareholder, this action would have to be brought as a shareholder derivative action in New York. See, Brieterman v. Elmar Properties, Inc., 123 A.D.2d 735 (2nd Dept. 1986); and New Castle Siding Co., Inc. v. Wolfson, 97

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A.D.2d 501 (2nd Dept. 1983), *aff'd.* 63 N.Y.2d 782 (1984); and Business Corporation Law §626.

Ohio has a far greater interest than New York in assuring that controlling or majority shareholders in Ohio corporation observe proper corporate formalities and comport with the fiduciary duties imposed upon them. See, Sturman v. Singer, 213 A.D.2d 324 (1st Dept. 1995).

New York has an interest in protecting its citizens from questionable acts of foreign corporations only when the foreign corporation has significant contact with New York. See, Broida v. Bancroft, 103 A.D.2d 88 (2nd Dept. 1984). In *Broida*, the only nexus the corporation had to Delaware was that it was incorporated in that state. Its principal office was located in New York. The corporate defendant's transfer agent and books and records were in New York. Its stock was publicly traded on the New York Stock Exchange. Its shareholders and directors meetings were held in New York. It had litigated in the New York courts.

None of these factors are present in this case. Ohio law permits Jeryl to sue Kratz and Steven individually, as controlling or majority shareholders of ICC , their liability, if any, upon alleged breaches of fiduciary duty. New York law does not. Further, ICC is not authorized to do business in New York. Its principal place of business is located in Columbus, Ohio. Its books and records are located in Ohio. To the extent that ICC conducts shareholders or directors meeting, those meetings are

held in Ohio. It is a close corporation whose stock is not publicly traded. It has not been shown that ICC has previously availed itself of the jurisdiction of the courts of New York.

Jeryl clearly has another convenient forum in which to litigate her claims -- Ohio. Jurisdiction can be obtained over Kratz in Ohio since he is an Ohio resident and domiciliary. Jurisdiction can also be obtained over Steven since he is regularly in Ohio in connection with his position with ICC.

In any event, CPLR 327(a) permits the court to condition the dismissal on such terms as may be just. The dismissal against Steven, therefore, must be conditioned upon his consenting to the jurisdiction of Ohio.

To the extent that the action is premised upon the shareholders agreement, the agreement is governed by Ohio law. Paragraph 12(l) of the shareholders agreement provides that the agreement shall be interpreted in accordance with the laws of the State of Ohio. New York will enforce contractual choice of law provisions provided that the law of the jurisdiction selected bears a reasonable relationship to the agreement and the law selected does not violate fundamental public policy of New York.

Welsbach Electric Corp. v. Mastec North America, Inc., 23 A.D.3d 639 (2nd Dept. 2005); and Culbert v. Rols Capital Co., 184 A.D.2d 612 (2nd Dept. 1992). This choice of law provision clearly bears a reasonable relationship to the agreement. Neither party asserts that the application of Ohio law would violate a fundamental policy of the State of New York.

This is essentially an imported action. The only nexus to New York is that Plaintiff and one of the Defendants resides here. This would unnecessarily burden the courts in New York. See, Bader & Bader v. Ford, 66 A.D.2d 642 (1st Dept. 1979). On balance, substantial justice would be best served if this action is were heard in Ohio.

Since the Court is dismissing this action pursuant to CPLR 327, it need not address the issues of whether this action should be stayed and arbitration compelled and whether a necessary party should have been named. These questions are respectfully referred to the Ohio courts for determination.

Accordingly, it is,

ORDERED, that Defendants' motion to dismiss this action pursuant to CPLR 327 is **granted**, provided that Steven Glaser consents to the jurisdiction of the Ohio courts in writing within 20 days of service of a copy of this order together with notice of entry. In the event that Steven Glaser does not so consent, the motion to dismiss this action pursuant to CPLR 327 is **denied** and the balance of the issues raised on this motion shall be restored to this Court's calendar on five days notice.

This constitutes the decision and order of this Court.

Dated: Mineola, NY
October 5, 2006

Hon. LEONARD B. AUSTIN, J.S.C.