STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

GREGORY-VINCENT PETEREIT,

Plaintiff, DECISION AND ORDER

v.

Index #2006/09097

JOHN B. BATTAGLIA and ENSOL, INC.,

Defendant.

Defendants, John B. Battaglia and Ensol, Inc., move pursuant to CPLR §3212 for an order granting them summary judgment dismissing plaintiff's complaint in its entirety. In response, plaintiff submits no formal motion to the court, and there is no indication that plaintiff has paid the statutory fee required upon making a motion. Despite this, however, plaintiff seeks leave to amend the complaint and an order of dissolution of Ensol, Inc. These requests are not properly before the court, and they are denied. Moreover, with respect to leave to amend, the court further notes that plaintiff has failed to even proffer a copy of the proposed amended pleading.

> Where the proposed amended pleading is not attached to the **404 request to replead, there must at least be a specification of what new theories or facts supporting recovery will be included in an amended pleading, Walker v. Pepsico, Inc., 248 A.D.2d 1015, 669 N.Y.S.2d 1003 (4th Dept. 1998), so that a court might have a chance to exercise its discretion by weighing the several factors which are relevant to such a motion. Branch v. Abraham & Strauss Dept. Store, 220 A.D.2d

474, 475, 632 N.Y.S.2d 168 (2d Dept. 1995).

Langdon v. Town of Webster, 182 Misc.2d 603, 617 (Sup. Ct. Monroe Co. 1999), aff'd, 270 A.D.2d 896 (4th Dept. 2000). Given the specification in plaintiff's moving papers, a further motion might, in light of the determinations below, not be necessary.

Defendant Ensol is a business formed by Defendant Battaglia in 1995 and engaged in the business of providing engineering services to owners of sanitary landfills for the design, construction, and operation of sanitary landfills in accordance with applicable laws and regulations. On April 30, 1999 plaintiff and defendants entered into a Shareholder and Stock Purchase Agreement ("the Agreement"), whereby plaintiff was to be issued 20 shares of Ensol stock. Plaintiff was also hired as an employee of Ensol at this time. Plaintiff paid for the shares over time, with the shares being fully paid for since 2001. Plaintiff's shares gave him 10% ownership of Ensol. The Agreement states the following with respect to Plaintiff's stock ownership:

> 3. Purchase Price
>
> Owner and Buyer recognize the importance of their relationship and its long term mutual viability and the Owner agrees to the sale to the Buyer of 20 shares of stock which represents 10% ownership of the outstanding shares of the Corporation with the following conditions:
>
> I) The Buyer shall pay the sum of $25,000.00 for his shares

ii) Stock powers to vote shares shall be right of Buyer upon purchase
iii) Buyer entitled to ownership of said shares so long as he remains an employee
iv) Owner shall have first right of refusal to re-purchase stock
v) Shareholders to have second right of refusal to re-purchase stock...

The Agreement also provides the following in Section 11:

> 11. Termination
>
> This Agreement shall terminate upon the happening of any of the following...
>
> ii) Dismissal of Buyer by the Corporation...
>
> The agreement to purchase said shares will terminate upon the purchase price being paid in full... In the event of dismissal of Buyer, Seller shall have first right of refusal to purchase shares, less any monies outstanding, from Buyer at the price of shares mutually agreed upon specified in the last documented and mutually agreed upon value pursuant to Section 5 of this Agreement.

Defendants allege that Plaintiff was let go from Ensol in March 2006 because Plaintiff had not yet obtained his Professional Engineer's license, a goal which had allegedly been anticipated by the parties when he was hired. After he was terminated, Plaintiff's counsel wrote to Defendant Battaglia, offering Plaintiff's shares of Ensol for sale pursuant to the right of first refusal set forth in the Agreement. The parties did not reach an agreement for the purchase of the shares, and plaintiff

commenced this action seeking an order, inter alia, compelling such purchase at an appraised value (first cause of action).

The second, third and fourth causes of action allege that Battaglia breached his fiduciary duty and duties of honesty, good faith, and undivided loyalty to Ensol by diverting business opportunities from Plaintiff. Plaintiff's claims of business opportunity diversion stem from Ensol's purchase of stock in two companies in November 2001, Environmental Services Group (NY), Inc. ("ESG") and American Recyclers Company, Inc. ("American Recyclers"), as well as the August 2005 purchase of the property where Ensol is situated in Niagara Falls, New York, by Battaglia's wife, Laurie Battaglia. No discovery has, as yet, been had.

Summary Judgment

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted). See also Potter v. Zimber, 309 A.D.2d 1276 (4th Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank

Corp., 100 N.Y.2d 72, 81 (2003), *citing* Alvarez, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v Johnson, 147 A.D.2d 312, 317 (2nd Dept. 1989) (citations omitted).

First Cause of Action

The first cause of action in plaintiff's complaint seeks an order requiring defendants to purchase his shares. The complaint does not specify whether defendants Ensol or Battaglia must be required to make such payment. As outlined above, the Agreement provides for Battaglia to have a right of first refusal in the shares owned by plaintiff in the event of the latter's termination.

"A right of first refusal is a right to receive an offer. . . ." Cipriano v. Glen Cove Lodge, 1 N.Y.3d 53, 60 (2003). Thus, "[t]he effect of a right of first refusal, also called a

preemptive right, is to bind the party who desires to sell *not to sell*, without first giving the other party the opportunity to purchase the property at the price specified." LIN Broadcasting Corp. v. Metromedia, Inc., 74 N.Y.2d 54, 60 (1989). "In sum, a right of first refusal merely provides that before an owner sells, it will first give the other party a chance to buy." Id. "[I]t is a restriction on the power of one party to sell without first making an offer of purchase to the other party upon the happening of a contingency. . . ." Id. The Court of Appeals has summarized the rights attendant to a right of first refusal as follows:

> A preemptive right, or right of first refusal, does not give its holder the power to compel an unwilling owner to sell; it merely requires the owner, when and fi he decides to sell, to offer the property first to the party holding the preemptive right so that he may meet a third-party offer or buy the property at some price set by a previously stipulated method... Once the owner decides to sell the property, the holder of the preemptive right may choose to buy it or not, but the choice exists only after he receives an offer from the owner. If the holder decides not to buy it, then the owner may sell to anyone. . . .

Metropolitan Trans. Auth. v. Bruken Realty Corp., 67 N.Y.2d 156, 163 (1986) (citations omitted).

Here, defendants hold a right of first refusal to purchase the 20 shares of stock sold to plaintiff, should plaintiff decide to sell them. The right of first refusal does not obligate

defendants to purchase the shares, but rather obligates plaintiff to first offer them to defendant. Defendants thus establish as a matter of law that, under the Agreement, defendants are under no obligation to purchase the stock as alleged in the First Cause of Action.

Plaintiff's first cause of action also relies upon BCL §623 for plaintiff's alleged appraisal rights. At the outset, nothing in BCL §623 requires defendants to purchase plaintiff's shares. Moreover, BCL §623 (a)-(h) sets forth the procedure for a dissenting shareholder to receive appraisal rights. There is no allegation, or indication even, that the BCL §623 procedure has been followed by plaintiff herein.

Defendants' motion for summary judgment dismissing the first cause of action is granted.

Second, Third, and Fourth Causes of Action

Plaintiff's second cause of action alleges that Battaglia "failed to perform his fiduciary duties as an officer, director and shareholder of Ensol, and without Plaintiff's consent, has improperly acquired, lost, and wasted corporate assets." Plaintiff's complaint, ¶24. Likewise, the third cause of action alleges that "[a]s an officer, director and shareholder of Ensol, Battaglia breached his duties of honesty, good faith, undivided loyalty to Ensol, and his duty not to compete with or profit at the expense of Ensol." Id. at ¶27. The fourth cause of action

pleads a diversion of Ensol's corporate opportunity to the detriment of plaintiff's rights as shareholder.

A shareholder does not possess a private cause of action for a wrong alleged against a corporation. See Abrams v. Donati, 66 N.Y.2d 951, 953 (1985). See also, Hahn v. Stewart, 5 A.D.3d 285 (1st Dept. 2004); Davis v. Mangavern, 237 A.D.2d 902 (4th Dept. 1997). "[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." Abrams, 66 N.Y.2d at 953. See also, Lamberti v. 30 Real Estate Corp., 8 A.D.3d 211 (1st Dept. 2004); Albany Plattsburgh United Corp. v. Bell, 307 A.D.2d 416 (3d Dept. 2003). The case of Fender v. Prescott, 101 A.D.2d 418 (1st Dept. 1984), aff'd, 64 N.Y.2d 1077, 1079 (1985), the authority cited by plaintiff in opposition to the motion for summary judgment, supports the proposition that, as shareholders in a close corporation vis-a-vis each other, fiduciary duties are owed not just to the corporation but to each shareholder.[1]

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[1] Beyond that, the "relationship between shareholders in a closed corporation, vis-á-vis each other, is akin to that between partners and imposes a high degree of fidelity and good will" (Fender, 101 A.D.2d at 422, 476 N.Y.S.2d 128; see Brunetti v. Musallam, 11 A.D.3d 280, 281, 783 N.Y.S.2d 347).

Ajettix Inc. v. Raub, 9 Misc.3d 908, 912 (Sup. Ct. Monroe Co. 2005). See also, Global Minerals and Metals Corp. v. Holme, ___ A.D.3d ___, 824 N.Y.S.2d 210, 214-15 (1st Dept. 2006)(parroting Ajettix virtually in haec verba on this and associated points).

Plaintiff and Battaglia are the only two shareholders of Ensol. This aspect of Fender survives Ingle v. Glamore Motor Sales, Inc., 73 N.Y.2d 183, 189 (1989). As explained in Brunetti v. Musallam, 11 A.D.3d 280, 281 (1st Dept. 2004):

> The "relationship between shareholders in a close corporation, vis a vis each other, is akin to that between partners and imposes a high degree of fidelity and good faith" (Fender v. Prescott, 101 A.D.2d 418, 422, 476 N.Y.S.2d 128 [1984], affd. 64 N.Y.2d 1077, 1079, 489 N.Y.S.2d 880, 479 N.E.2d 225 [1985]). This "strict standard of good faith imposed upon a fiduciary may not be so easily circumvented" (id. at 423, 476 N.Y.S.2d 128). Defendant's reliance upon Ingle v. Glamore Motor Sales, Inc., 73 N.Y.2d 183, 538 N.Y.S.2d 771, 535 N.E.2d 1311 [1989] is misplaced as there the issue was whether plaintiff, by virtue of his status as a minority shareholder of a closely held corporation, was entitled to "a fiduciary-rooted protection against being fired."

See also, Matter of Patti v. Fusco, 10 Misc.3d 1058(A), 809 N.Y.S.2d 482 (Sup. Ct. Nassau Co. 2005). Thus, if the allegation of breach by a shareholder/employee of a close corporation is independent of the employer-employee relationship itself, and a cognizable claim of breach of fiduciary duty may be made out against a co-shareholder of a close corporation by another shareholder, independent of the claims the shareholder might prosecute derivatively on behalf of the corporation, a plaintiff/shareholder may sue individually. 12B William Meade Fletcher, Cyclopedia of the Law of Corporations § 5811.05.

But the claims asserted must be independent of the claims that would otherwise be brought derivatively on behalf of the

corporation. As well summarized:

> As a general matter, New York *439 courts have held that "[a]n individual shareholder has no right to bring an action in his own name and in his own behalf for a wrong committed against the corporation, even though the particular wrong may have resulted in a depreciation or destruction of the value of his corporate stock." Fifty States Mgmt. Corp. v. Niagara Permanent Sav. & Loan Ass'n, 58 A.D.2d 177, 396 N.Y.S.2d 925, 927 (App.Div.1977) (citing, inter alia, Bonneau v. Bonneau, 21 Misc.2d 879, 195 N.Y.S.2d 443, 445 (Sup.Ct.1959)); see New Castle Siding Co. v. Wolfson, 97 A.D.2d 501, 468 N.Y.S.2d 20, 21 (App.Div.1983) ("Generally, corporations have an existence separate and distinct from that of their shareholders." (citing Billy v. Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 432 N.Y.S.2d 879, 412 N.E.2d 934, 941 (1980))), aff'd, 63 N.Y.2d 782, 481 N.Y.S.2d 70, 470 N.E.2d 868 (1984). The New York Court of Appeals has held that this prohibition includes recovery for any personal liability the shareholder incurs "in an effort to maintain the solvency of the corporation." Abrams v. Donati, 66 N.Y.2d 951, 498 N.Y.S.2d 782, 489 N.E.2d 751, 751 (1985). This rule applies regardless whether the corporation is a larger, publicly traded corporation, or a closely held corporation. See Wolf v. Rand, 258 A.D.2d 401, 685 N.Y.S.2d 708, 710 (App.Div.1999) ("Even where the corporation is closely held, and the defendants might share in the award, the claims belong to the corporation, and damages are awarded to the corporation rather than directly to the derivative plaintiff.").
>
> However, there is an exception to this general principle of law: "Where the injury to the shareholder results from a violation of a duty owing to the shareholder from the wrongdoer, having its origin in circumstances independent of and extrinsic to the corporate entity, the shareholder has a personal right of action against the wrongdoer." *440 Fifty States, 396 N.Y.S.2d at 927 (citing Shapolsky v. Shapolsky, 53 Misc.2d 830, 279 N.Y.S.2d 747, 751 (Sup.Ct.1996), aff'd, 28 A.D.2d 513, 282 N.Y.S.2d 163 (App.Div.1967)); see New Castle Siding Co., 468 N.Y.S.2d at 21 ("Where ... the injury to a shareholder resulted from the violation of a duty owing to the shareholder from the wrongdoer, having its origin in circumstances independent of and extrinsic to the corporate entity,

> an individual cause of action may exist for a shareholder of an allegedly wronged corporation." (citing Shapolsky, 279 N.Y.S.2d at 751)). Thus, an individual shareholder lacks standing to bring his or her claim where "the duty owed to the shareholder[ ] is ... indistinguishable from the duty owed to the corporation." Vincel v. White Motor Corp., 521 F.2d 1113, 1121 (2d Cir.1975). Absent an independent duty, the shareholder's perceived injury is deemed to be considered the same injury as that to the corporation and, consequently, the shareholder maintains no separate right of action separate and apart from the corporation's. Fifty States, 396 N.Y.S.2d at 927 (citing Shapolsky, 279 N.Y.S.2d at 751).

Henneberry v. Sumitomo Corp. of America, 415 F.Supp.2d 423, 438-40 (S.D.N.Y. 2006).

The only fair reading of the complaint is that Battaglia "wasted corporate assets" by making an "unlawful conveyance, assignment, or transfer of corporate assets" (Second Cause of Action), that he violated a duty not to compete with Ensol (Third Cause of Action), and that he did so by wrongfully "divert[ing] and exploit[ing] business opportunities from Petereit" (Fourth Cause of Action), arising out of Ensol's purchase of two companies through which Battaglia subsequently steered what would otherwise have been Ensol's business. Although these are matters wholly divorced from the employer-employee relationship itself, Brunetti v. Musallam, supra, they are rooted in an alleged diversion of Ensol's corporate opportunity by virtue of the purchase of other concerns through which business was allegedly channelled. Plaintiff pleads no breach of the April 1999 Shareholder and Stock Purchase Agreement entered into between the

parties. Cf., Herbert H. Post & Co. v. Sidney Bitterman, Inc., 219 A.D.2d 214, 225 (1st Dept. 1996). Defendants' pre-discovery motion for summary judgment on the second, third, and fourth causes of action is, therefore, granted. Ehrlich v. Hambrecht, 19 A.D.3d 259 (1st Dept. 2005). Leave to amend or re-plead for the purpose of adding shareholder derivative claims is denied so long as Ensol remains a party defendant, but is otherwise granted.

Fifth Cause of Action

The fifth cause of action seeks an injunction without reference to any other theory of the case (albeit the prayer for relief in regard to the fifth cause of action also seeks money damages). Defendants' motion for summary judgment dismissing the cause of action for a permanent injunction is predicated largely on the claimed absence of independent duty owed to plaintiff as a shareholder, a proposition fully supported by the case law discussed above. Accordingly, the motion for summary judgment dismissing the fifth cause of action is granted also.

CONCLUSION

The motion for summary judgment is granted in its entirety.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January 11, 2007
Rochester, New York