

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 22

JAMES J. GIACOPELLI and DORIS J.
GIACOPELLI,

Plaintiffs,

-against-

DINO GUIDUCCI,

Defendant.

and

MADISON PLAZA HOMES, INC.,
Nominal Defendant.

Index No. 13573/05

Motion

Date February 27, 2007

Motion

Cal. No. 6

Motion

Seq. No. C003

The following papers numbered 1 to 11 read on this motion by
plaintiffs for an order pursuant to CPLR 3212 granting partial
summary judgment on the third cause of action to compel payment
of \$471,528.75 constituting plaintiffs' share of corporate
earnings as of December 31, 2005.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Affirmation in Opposition.....	5-7
Reply Affirmation.....	8-10
Plaintiffs' Memorandum of Law.....	11

Upon the foregoing papers it is ordered that this motion is
denied for the reasons set forth as follows:

I. INTRODUCTION

A. Procedural Background

Plaintiffs brought this action individually and derivatively
against defendants seeking monetary damages and equitable relief
alleging three causes of action in the Complaint: (1) for

breach of fiduciary duty, misappropriation of corporate assets and self dealing, (2) for an accounting, and (3) to compel the distribution of retained earnings.

B. Factual Background

Plaintiffs James J. Giacobelli and Doris J. Giacobelli, his wife, and defendant Dino Guiducci ("Guiducci") are stockholders of Madison Plaza Homes, Inc. ("MPH"). MPH is a closely held domestic real estate corporation organized on December 12, 1978 for the express purposes, among others things, of acquiring, developing, constructing and leasing real properties, and which owns income producing rental properties in Queens County, New York. Guiducci owns 75% of the stock and plaintiffs, as joint tenants with right of survivorship, own 25% of the stock. The corporation has only two directors. Dino Guiducci is a director and president, while James J. Giacobelli is a director and secretary. The Bylaws provide that corporate action requires unanimous consent of the two (2) directors, so that neither director has voting control. Up until December 31, 2005, MPH had accumulated earnings of \$1,886,115.00. For the period of January 1997 through June 2003, MPH made regular distributions to plaintiffs totaling \$315,000.00. MPH has not declared a dividend or made a distribution to the stockholders since 2001. Since in or about December, 2001, plaintiffs have demanded that Guiducci distribute to them 25% of the accumulated corporate earnings, but MPH has declined to do so. By letter dated May 16, 2003, Dino Guiducci as director and president of MPH, notified Giacobelli "that there are no planned shareholder distributions at this time." Although plaintiffs have not received a distribution of the corporate profits, plaintiffs have paid personal income taxes on such corporate profits based upon their proportionate ownership of the outstanding shares of stock. Defendant Guiducci contends that he is seeking to retain and accumulate the earnings for the purpose of creating a capital fund to use to finance the purchase of prospective investment real estate property and that they, the plaintiffs, have nothing to do with the making of policy concerning declaration and distribution of dividends in the corporate defendant. The issue between plaintiffs and the defendant Guiducci concerns his objection to the distribution of the corporate earnings to the plaintiffs. This action was commenced on June 17, 2005.

C. Summary Judgment Standard

The rule governing summary judgment requires the proponent

of a summary judgment motion to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case (*Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v. Carlin*, 260 AD2d 201 [1st Dept 1999]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v. Williams*, 84 AD2d 648, 649 [3rd Dept 1981]; *Greenberg v. Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). The burden of production as well as the burden of persuasion always rests on the proponent of the motion (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Thus "if the evidence on the issue is evenly balanced, the party that bears the burden must lose." (*300 East 34th Street Co. v. Habeeb*, 248 AD2d 50 [1st Dept 1997]).

If the moving party satisfies those standards, the burden shifts to the opponent to rebut that *prima facie* showing by presenting evidence in admissible form establishing the existence of triable issues of fact (see CPLR 3212[b]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Davenport v. County of Nassau*, 279 AD2d 497 [2001]; *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]; *Kaufman v. Silver*, 90 NY2d 204, 208 [1997]). It is well settled that summary judgment should be denied if there is any doubt as to the existence of a triable issue of fact (*Stone v. Goodson*, 8 NY2d 8 [1960]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Freese v. Schwartz*, 203 AD2d 513 [2d Dept 1994]). The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]).

When deciding a motion for summary judgment, the court must review the evidence in the light most favorable to the non-moving party, and must give that party all of the reasonable inferences that can be drawn from the evidence (*Louniakov v. M.R.O.R. Realty Corp.*, 282 AD2d 657 [2d Dept 2001]; *SSBSS Realty Corp. v. Public Service Mut. Ins. Co.*, 253 AD2d 583, 584-585 [1st Dept 1998]).

D. Summary of Corporation Law

The third cause of action in the Complaint upon which this motion is based is essentially a claim by the stockholders and director Giacobelli to compel the declaration of a dividend upon all of the outstanding stock. (The court notes that it appears that plaintiffs apparently are seeking a declaration of a dividend solely upon their 25% share of the outstanding stock and not upon all of the outstanding stock).

1. Stockholder

Generally, a stockholder has no individual cause of action to recover dividends that have not been declared. All that a stockholder can do is to sue in equity to cause the court to perform a corporate function which the directors would have executed except for bad faith (*Gordon v. Elliman*, 306 NY 456 [1954]). Unlike an action at law by stockholders to recover dividends that have been declared, a suit in equity to compel the declaration of dividends is, in theory against recalcitrant directors to cause them to perform their duty as officials of the corporation (*Gordon v. Elliman*, 306 NY at 460).

The management of a corporation is vested in its board of directors. It is a part of the function of the directors to determine: whether or not dividends should be paid, the amount of such dividends, and when they should be paid. The stockholders cannot substitute their judgment for that of the directors (*Liebman v. Auto Strop Co.*, 241 NY 427 [1926] [The court held that where the directors, in their discretion, have failed to declare a dividend, the court will not interfere with such discretion unless such failure was the result of bad faith or a clear abuse of discretion on the part of the directors, unless it is shown that the directors have acted or are about to act in bad faith and for a dishonest purpose. However, in a proper case, of course, a court of equity will interfere, but facts must be presented from which the court can find that such action has underlying it a fraudulent purpose and corrupt intent]).

2. Corporate Directors

It is well settled that 'whether or not dividends shall be

paid, and the amount of the dividend at any time, is primarily to be determined by the directors, and there must be bad faith or a clear abuse of discretion on their part to justify a court of equity in interfering; accordingly, unless fraud, bad faith or dishonesty on the part of directors can be shown, their judgment in withholding a dividend from the stockholders will be regarded as conclusive' (*Gordon v. Elliman*, 306 NY 456, 459 [1954], citing 11 Fletcher's Cyclopaedia Corporations [Perm. ed.], § 5325). The New York cases amply sustain the necessity to establish bad faith on the directors' part (*City Bank Farmers Trust Co. v. Hewitt Realty Co.*, 257 NY 62 [1931]; see also *Lockley v. Robie*, 276 App Div 291 [4th Dept 1950], modified on other grounds 301 NY 371, rearg denied 301 NY 731; [Courts will not ordinarily make determinations as to whether a corporation shall declare dividends, as internal management of corporation rests within sound discretion of board of directors and only in instances where it is shown that refusal to declare dividends is harmful to corporation and stockholders generally, will court depart from general rule]).

II. DISCUSSION

1. Out-of-state affidavit without certificate of conformity.

Plaintiff James Giacobelli submitted an out-of-state affidavit of plaintiff and an attorney's affirmation. Plaintiff's attorney's affirmation is not admissible probative evidence, as plaintiff's attorney has failed to demonstrate personal knowledge of the facts (*Slona v. Schoen*, 251 AD2d 319 [2d Dept 1998]). Moreover, plaintiff submitted his own affidavit purportedly sworn in the State of California without the requisite certificate of conformity. Plaintiff's affidavit of facts fails to comport with the requirements of CPLR 2309(c).

Since the affidavit was executed out of state and does not comply with CPLR 2309(c), it is not competent evidence in admissible form and is insufficient to raise a triable issue of fact (*Discover Bank v. Kagan*, 8 Misc 3d 134[A], 2005 NY Slip Op 51171[U] [App Term 2nd and 11th Jud Dist]). Plaintiff's submissions are insufficient to show the absence of a triable issue of fact. As these submissions are not in admissible form and are not probative evidence, they may not be considered by this court as plaintiffs' support of the summary judgment motion.

2. Plaintiffs have failed to establish a *prima facie* case and defendants have raised triable issue of fact.

Even assuming that plaintiff's affidavit complied with requirements of CPLR 2309(c), plaintiffs have still failed to make a *prima facie* showing of entitlement to summary judgment as a matter of law. In order for plaintiffs to succeed on their motion for summary judgment they must make a *prima facie* showing: (1) that they made a proper request to defendant that a dividend be declared and that such request was unreasonably and wrongfully refused; and (2) that the determination of defendant was in bad faith, an abuse of discretion, and an exercise of unsound business judgment harmful to the corporation.

The management of a corporation is vested in its board of directors. It is a part of the function of the directors to determine whether or not dividends should be paid, the amount of such dividends, and when they should be paid (*Gordon v. Elliman*, 306 NY 456 [1954]). It is the prerogative of the board of directors to declare a dividend which, in the absence of fraud, bad faith or dishonesty, is conclusive (*Oshrin v. Hirsch*, 6 AD3d 353 [1st Dept 2004]; *Kamin v. American Exp. Co.*, 86 Misc 2d 809, *affd* 54 AD2d 654, [1st Dept 1976] [Question of whether or not dividend is to be declared or distribution of some kind should be made is exclusively a matter of business judgment for corporation's board of directors]).

Plaintiffs do not contend, and have proffered no evidence to show that there exists any internal dissension with respect to the daily operation of the defendant corporation's business activities. For purposes of this motion for partial summary judgment, plaintiffs' interests are solely driven by their desire to get cash out of the corporation, especially in light of the fact that they have already paid personal income taxes based on MPH's accumulated earnings and profits.

Plaintiffs in their capacities as stockholders and director contend that defendant Guiducci has refused to agree to a distribution of corporate earnings. One director, plaintiff Giacobelli has elected that the corporation declare a dividend, and the other director, defendant Guiducci has opposed any distribution or dividend. The internal dissension does not arise from the day-to-day operation of the corporation, but rather, it principally derives from a business disagreement between two 50% voting directors concerning the business decision with respect to

whether the corporation should retain earnings for future purchases of real estate or whether the earnings should be distributed to the stockholders.

Other than the bald conclusory allegation by plaintiffs that defendant Guiducci's refusal to distribute MPH's accumulated earnings is an act of bad faith and dishonesty and is abuse of discretion, plaintiffs have failed to proffer any evidence to support such conclusion. Plaintiffs fail to allege any conduct that constitutes dishonesty, or bad faith on the part of defendant other than defendant's refusal to agree with plaintiffs' demand to declare a distribution of corporate earnings.

Plaintiffs contend that defendant Guiducci's reason for retaining the corporate earnings for the purpose of accumulating capital to finance future purchases of investment real estate is an exercise of unsound business judgment, bad faith, or at best a pretext. Although plaintiffs submitted evidence showing that as of 2005, MPH had cash on hand in excess of \$1,886,115.00, and from 2000 has operated at a profit, such evidence is insufficient to show that there is no triable issue of fact that the decision of defendant Guiducci to not declare or pay dividends was in bad faith or abuse of discretion, or unsound business judgment as a matter of law.

Plaintiffs failed to submit any evidence to show that the dispute between the parties is no more than a deadlock between the two 50% voting directors of a corporation over a decision to declare and distribute dividends. On the record plaintiffs have presented to this court, plaintiffs have failed to demonstrate that there is no triable issue of fact as to whether there was no valid business reason to withhold distribution of accumulated earnings. Plaintiffs have failed to make a *prima facie* showing that the inability of the two 50% voting directors to agree on whether corporate earnings should be distributed as dividends constitutes grounds for a court in equity to interfere with the internal management and operation of the corporation absent factual proof of fraud, bad faith or dishonesty.

On the other hand, defendant has submitted evidence to establish a triable issue of fact as to whether the decision to retain and accumulate earnings to provide capital for MPH to purchase additional investment property indicates sound judgment and business management. Sound business management must look,

not only to the present requirements of the business, but it must closely consider the requirements of the future as well. Defendant established a triable issue of fact as to whether it is sound business management judgment to not distribute any or part of the accumulated earnings in dividends for the reason of accumulating capital to finance future purchases of real estate.

3. Attorney fees

The plaintiffs contend that funds were expended by the corporation to pay attorney fees on behalf of the corporation and director Guiducci to defend this action. This was offered on the theory that the attorney fees were undeclared dividends, and indicated bad faith in failure of the defendants to declare dividends. Plaintiffs submitted no evidence to show that the amount of the attorney fees in and of itself demonstrates that it is excessive, and there is no proof that the services rendered were not worth the amounts paid. Bad faith cannot be inferred from this evidence, and this action is not one to recover for attorney fees illegally paid. Plaintiffs have failed to make a *prima facie* showing that the paying of the legal fees of defendant Guiducci, as director of corporate defendant, constitutes a distribution of corporate earnings.

The court has considered plaintiffs' remaining arguments and finds them without merit.

III. CONCLUSION

Whether it is considered a failure of plaintiffs to establish a *prima facie* case or defendants raising triable issues, the record on this motion does not permit a conclusion that as a matter of law the defendant's decision to accumulate earnings for the purpose of making future purchases of real estate was an act or conduct that constitutes bad faith or dishonesty on the part of the defendant Guiducci.

Accordingly, plaintiffs' motion for partial summary judgment is denied.

This constitutes the decision and order of this Court.

Dated: April 17, 2007

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Howard G. Lane, J.S.C.