[* 1]

SCANNED ON 3/11/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

RICHARD B. LOWE III

PRI 0604247/2002 PART 36

DECANA INC.,

VS

CONTOGOURIS, SPYRO C.

NO.

DATE 1/12/05

SEQ. NO.

CAL. NO.

SEQ 16

PARTIAL SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 11 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/9/05

RICHARD B. LOWE III
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

----------X

DECANA INC., PRESTIGE HOLDINGS INC., and CHANGOLE INTERNATIONAL B.V.,

Plaintiffs,

-against-

Index No. 604247/02

SPYRO C. CONTOGOURIS, SCHANSON CAPITAL MANAGEMENT LLC, PRESTIGE HOLDINGS INC., NORTH FORK BANK, NYMC CAPITAL CORP, and PETER ASHE REALTY SERVICES, INC. (aka/dba PETER ASHE REALTY and the PETER ASHE COMPANY),

Defendants,

----------X

NORTH FORK BANK,

Third-Party Plaintiff,

-against-

VASSILIOS C. MANIOS,

Third-Party Defendant.

----------X

RICHARD B. LOWE III, J.:

Motion sequence numbers 016 and 017 are consolidated herein for disposition. In motion sequence number 016, plaintiffs Decana Inc. (Decana), Prestige Holdings Inc. (PHI),[1] and Changole International B.V. (Changole) move, pursuant to CPLR 3212, for partial summary judgment against defendant North Fork Bank (NFB) on the eighth cause of action of the

[1]Plaintiff PHI is a Delaware corporation that is distinct from defendant Prestige Holdings Inc., which is a Texas corporation.

Amended Complaint that seeks: (i) a declaration that certain loan documents issued by NFB are not enforceable against Decana; (ii) recovery for unjust enrichment; and (iii) return of all amounts paid to NFB by Decana.

In motion sequence number 017, NFB moves, pursuant to CPLR 3211(a)(7), for summary judgment dismissing the Amended Complaint as against it for failure to state a cause of action upon which relief can be granted.

The facts of this matter have been stated in prior decisions and will only be discussed herein to the extent necessary. These motions concern a mortgage, in the amount of $3.6 million (the Mortgage), on Decana's principal asset, a luxury apartment building located at 10 East 62nd Street in New York, NY (the Property), by NFB, in exchange for a loan from NFB in the same amount (the Loan).

Decana is a subsidiary of PHI, and PHI is owned by Changole. All shares in Changole are owned by non-party Brock Corporation, a company organized in the Netherlands Antilles. Prior to March 2002, third-party defendant Vassilios C. Manios (Manios) and non-party Evangelina Constantinou Manios Zachariou each owned 50% of the shares of the Brock Corporation. Long-standing property disputes were resolved in March of 2002, leaving Manios as sole owner of the shares in Brock Corporation, and, thereby, the sole beneficial owner of all of the plaintiff corporations.

In 1996, Decana was directly owned by Changole. At that time, PHI was formed, and ownership of Decana and other United States corporations controlled by the Manios family was transferred to PHI. Defendant Spyro C. Contogouris (Contogouris) was appointed President and Secretary of PHI. Attorney Mark Krassner (Krassner), who had been working with the Manios

family prior to 1996, was retained by Contogouris, and named sole Director.

According to the Amended Complaint, in August of 2000, Krassner resigned as Director of PHI and Decana, and Contogouris was named Director of both corporations. In early 2002, Christos Contogouris, Contogouris' father, brought suit against the plaintiff corporations. Changole decided, by resolution of April 5, 2002, that Contogouris should be removed from his positions as Director of Decana and PHI to avoid any conflict of interest that might arise in his defending a law suit brought by his father.

When Contogouris refused to resign, PHI and Decana brought suit to confirm his removal. His removal from Decana was confirmed by the New York State Supreme Court, New York County, in September of 2002 (Index No. 108965/2002), and, allegedly, his removal from PHI was confirmed by the Delaware Chancery Court several days later. After acquiring some of the books and records of Decana, the new principals of Decana purportedly discovered, for the first time, that Contogouris had executed two mortgages on the Property, including the Mortgage given to NFB.

The Loan and Mortgage were executed on April 4, 2001. According to the Amended Complaint, the transactions were made without the due authorization of Decana or PHI, and Contogouris utilized both a fraudulent corporate resolution of Decana, dated April 3, 2001, authorizing him to enter into the transaction with NFB (the Resolution), and an opinion letter prepared by NFB counsel and signed by Krassner without change (the Opinion Letter), as the basis for the fraudulent transactions. Contogouris signed the Resolution as holder of all shares of PHI, as Director of Decana, and, although he was not the Secretary, as Secretary of Decana.

The Loan proceeds were allegedly deposited in an NFB account opened by Contogouris,

and diverted from that account to his own use. According to the Amended Complaint, Contogouris made payments on the Loan to NFB out of Decana funds before he was removed as an officer of Decana. Since his removal, as this court did not issue a temporary restraining order against NFB, Decana continued to pay interest and principal on the Loan, totaling $1,104,277.09, as of the date of the Amended Complaint.

Motion 016 – Summary Judgment Against NFB

Plaintiffs maintain that they are entitled to partial summary judgment against NFB because Contogouris had neither actual nor apparent authority to cause Decana to enter into the transactions with NFB, that NFB should have discovered that the Resolution was fraudulent, and that since the Opinion Letter was written in the past tense and post-dates the Mortgage closing, there is a clear indication that NFB did not rely upon the Opinion Letter in deciding to extend the Loan.

Summary judgment is governed by CPLR 3212. Under subsection [b], plaintiffs must show that there is no defense to the eighth cause of action. Plaintiffs fall far short of this requirement.

Plaintiffs argue that, even if given further discovery, NFB will not be able to prove that Contogouris had actual or apparent authority to execute the Loan and Mortgage transactions. However, merely pointing to putative deficiencies in NFB's case is not sufficient to grant summary judgment. Instead, plaintiffs are required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Plaintiffs have failed to do so.

Even though the validity of the Resolution may be refutable, NFB also obtained the Opinion Letter, which supports the assertion that NFB reasonably relied upon the apparent authority of Contogouris. On summary judgment, however, the role of the court is not one of assessing credibility, but simply one of discerning whether there are issues of fact requiring trial. S.J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974). Here, the existence of Contogouris' apparent authority, and the reasonableness of relying on that apparent authority, are both issues of fact precluding summary judgment. Minskoff v American Express Travel Related Servs., Inc., 98 F3d 703, 708 (2nd Cir 1996).

Moreover, NFB has not had an opportunity to depose Contogouris, the defendant that they aver had actual or apparent authority to enter into the transactions. See e.g. Two Rector Co. v Ebasco Servs. Inc., 78 AD2d 804, 805 (1st Dept 1980). Further discovery could potentially yield information that supports NFB's claims. The motion of plaintiffs for partial summary judgment on the branch of the eighth cause of action that seeks a declaratory judgment that the Loan and the Mortgage are unenforceable, and return of funds paid to NFB, is denied. The remaining branches of the eighth cause of action are discussed below.

Motion 017 – Summary Judgment Dismissing the Complaint

NFB moves for summary judgment for failure to state a cause of action upon which relief can be granted. As stated earlier, the eighth cause of action seeks a declaration that the Loan and Mortgage are not enforceable, recovery for unjust enrichment, and return of all amounts paid to NFB by Decana. The ninth through eleventh causes of action, respectively, seek recovery against NFB for: (i) assisting and participating in Contogouris' breach of fiduciary duty; (ii) assisting and participating in Contogouris' fraud and conversion of Decana and PIII assets; and (iii)

commercial bad faith.

Partly based upon the assumed validity of the eighth through eleventh causes of action, the twelfth cause of action seeks an order: (i) enjoining NFB from encumbering or foreclosing on the Property; (ii) enjoining NFB from charging any interest rate penalties; (iii) ordering NFB to establish an escrow fund that will preserve payments made on the Loan pending resolution of the litigation; and (iv) enjoining NFB from taking any action on the Loan or the Mortgage until such time as the litigation is resolved.

Enforceability of the Loan and Mortgage

NFB maintains that: (i) Contogouris had apparent authority to bind Decana to the Loan and Mortgage agreements; (ii) NFB conducted reasonable due diligence; and (iii) plaintiffs are estopped from denying that Contogouris had apparent authority.

As a preliminary proposition, "directors of a corporation have the power to do whatever is permitted by its certificate of incorporation or charter in the ordinary course of its business." Matter of Leventall, 241 App Div 277, 282 (1st Dept 1934) (citations omitted); see also Odell v 704 Broadway Condominium, 284 AD2d 52, 56 (1st Dept 2001) ("[t]here is a general presumption that the president of a corporation is clothed with the powers which, of necessity, inhere in the position of chief executive") (citations omitted); Matter of Watertown Gaslight Co., 127 App Div 462, 466 (3rd Dept 1908) (until it is shown otherwise, there is a presumption that the acts of a director of a company are honest and in the best interests of the company).

Thus, Contogouris' position as Director of Decana raises a strong presumption that a third party conducting business with Decana may rely upon his authority, especially where, as here, the Opinion Letter implies that the corporate documents give the Director full authority to act.

Compare Rothman & Schneider, Inc. v Beckerman, 2 NY2d 493, 497 (1957) ("[w]here there has been no direct prohibition by the board ... the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation"). Indeed, if entities could not rely upon the power of the president (and, in this case, sole Director) of a corporation to enter into agreements on behalf of the corporation, the marketplace would, indeed, be a difficult place in which to conduct business at all.

Plaintiff's arguments with regard to the Opinion Letter (see supra) are largely futile. For instance, plaintiffs contend that NFB could not credibly have relied on the Opinion Letter because it post-dates the Mortgage documents. However, the Mortgage documents, although dated April 3, 2001 in the recitations, were signed on April 4, 2001. It is clearly established that where an agreement is written, acceptance is effective when the document is signed. See e.g. Antonucci v Stevens Dodge, Inc., 73 Misc 2d 173, 175 (Civ Ct, Queens County 1973).

The Mortgage, the Note, and the Opinion Letter were all signed on April 4, 2001. Thus, it is entirely plausible that NFB required the Opinion Letter, and relied upon its execution, to enter into the transactions. Further, plaintiffs' repeated asseveration that NFB, and not Krassner, drafted the Opinion Letter is a further indication that NFB may, indeed, have absolutely required the Opinion Letter to enter the transactions.

Plaintiffs also contend that the Opinion Letter cannot cloak Contogouris in apparent authority because only the misleading conduct of the principal, and not its agent, can create apparent authority. Contogouris was not an agent of Decana: Contogouris was an officer of Decana, arguably with actual authority to bind Decana. Ripley v Storer, 1 Misc 2d 281, 289 (Sup Ct, NY County 1955) (corporate directors are not agents of the stockholders, but have original

and undelegated powers that are conferred upon them by law).

The theory that Contogouris had actual authority is underscored by the fact that plaintiffs brought a prior action in this court to enforce their decision to remove him as Director and President of Decana (see Nawaday Affirmation, Exhibit H, Decision, Stavrou v Contogouris, Sup Ct, NY County, Index No. 108965/02, at 9-10). Contogouris' hypothesized authority is also suggested by a 1995 letter from Joann Korbakis, then President of Decana, predating the transactions, establishing that Contogouris was authorized to execute legal documents on behalf of Decana. See Savino Affirmation, Exhibit I.

Despite all this, plaintiffs assert several issues of fact that preclude summary judgment. For instance, plaintiffs argue that Krassner was working for Contogouris and not for Decana. This argument is confuted by plaintiffs' own evidence that shows that Krassner had been counsel for Decana from 1993, well before Cotogouris was named an officer of Decana. See Savino Affirmation, Exhibit B, Deposition of Joanne Korbakis, at 87:13-87:23. Nonetheless, plaintiffs maintain that Krassner did not work for Decana in any capacity related to the Mortgage and Note transactions, and as such, have raised an issue of fact as to the capacity in which Krassner executed the Opinion Letter.

Contogouris also allegedly submitted documents indicating conflicting amounts of beneficial ownership of PHI. Thus, plaintiffs contend that NFB should have known that Contogouris was engaging in a fraud upon Decana. Whether Contogouris' conflicting reports of ownership should have put NFB on notice of the alleged fraud is also a question of fact.

In addition, plaintiffs contend that the Resolution, submitted as proof of apparent authority, is of questionable validity because Contogouris signed not only as Director and sole

shareholder, but also as Secretary, and he was not the Secretary. However, the ministerially-withheld signature of a secretary on an otherwise valid resolution may not be necessary even if the secretary's signature is required according to the by-laws of the corporation. See e.g. Petition of Melloh, 17 Misc 2d 902, 904 (Sup Ct, NY County 1959). Therefore, it cannot be said, as suggested by plaintiffs, that NFB was required to reject the Resolution because of this apparent discrepancy.

Moreover, if Contogouris was indeed the sole shareholder of PHI, and it was not in violation of the certificates of incorporation or the by-laws of Decana or PHI, the power to sign the Resolution in all capacities was entirely feasible. See Business Corporation Law § 715 ("[a]ny two or more offices may be held by the same person. When all of the issued and outstanding stock of the corporation is owned by one person, such person may hold all or any combination of offices").

Whether NFB had an obligation to discover the alleged actual ownership rights of Contogouris, or the actual identity of the Secretary of Decana, are questions of fact that should not be resolved on summary judgment. The function of the court is one of issue finding not issue determination. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957); Wiener v Ga-Ro Die Cutting, 104 AD2d 331, 333 (1st Dept 1984), affd 65 NY2d 732 (1985). NFB claims not to have been aware of conflicting reports of Contogouris' ownership stake in PHI and Decana. However, on summary judgment, the credibility of the parties is not a proper consideration for the court. S.J. Capelin Assocs., 34 NY2d at 341; see also Siemens Solar Indus. v Atlantic Richfield Co., 251 AD2d 82, 82 (1st Dept 1998) ("...sophisticated entity's opportunities to obtain knowledge of the matters that are the subjects of the alleged

misrepresentations preclude its claim of reasonable reliance").

Thus, although there is considerable evidence of apparent or actual authority, it cannot be said, as a matter of law, that Contogouris definitely had the apparent or actual authority to execute the Mortgage and Note, and that NFB's reliance on the putative authority was reasonable. "The existence of apparent authority is normally a question of fact and therefore inappropriate for resolution on a motion for summary judgment." Minskoff v American Express Travel Related Servs. Co., Inc., 98 F3d 703, 708 (2nd Cir 1996); see also Herbert Constr. Co., 931 F2d at 994. Summary judgment dismissing the branches of the eighth cause of action that seek to declare the documents related to the Mortgage and Loan transactions unenforceable, and the return of amounts paid under those instruments, is denied.

Unjust Enrichment

The eighth cause of action also seeks recovery because NFB has, allegedly, been unjustly enriched by the Mortgage and Note transactions. Restitution is available through the operation of the equitable principle that a person or entity should not be unjustly enriched at another's expense. Ross v F.E.L., Inc., 150 AD2d 228, 232 (1st Dept 1989).

Here, NFB wishes to be repaid for the Loan; it will not be "enriched" whatsoever. The parties that stand to be enriched are the recipients of the Loan proceeds, not NFB. NFB has paid money to the plaintiffs, or to defendants Contogouris and/or Manios, and is already holding a Note; payment on the Note, if the Note is enforced, would be giving NFB what it already has, or is owed, and cannot be deemed unjust enrichment. Roth v Manufacturers Hanover Trust Co., 178 AD2d 267, 268 (1st Dept 1991).

Giving the non-movant plaintiffs the benefit of every favorable inference that may be

drawn from the pleadings, affidavits, and competing contentions of the parties (Myers v Fir Cab Corp., 64 NY2d 806 [1985]), summary judgment on the branch of the eighth cause of action that seeks recovery for unjust enrichment is granted.

As NFB has only addressed the eighth cause of action, summary judgment dismissing the ninth through twelfth causes of action is denied.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs Decana Inc., Prestige Holdings Inc., and Changole International B.V., pursuant to CPLR 3212, for partial summary judgment against defendant North Fork Bank (motion sequence number 016) is denied; and it is further

ORDERED that the motion of North Fork Bank, pursuant to CPLR 3211(a)(7), for summary judgment dismissing the Amended Complaint as against it for failure to state a cause of action (motion sequence number 017) is granted to the extent that the branch of the eighth cause of action that seeks recovery for unjust enrichment is dismissed, and it is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 9, 2005

ENTER:

RICHARD B. LOWE III
J.S.C.