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

PRESENT: RICHARD B. LOWE III Justice

PART 56

Marion Sakow

- v -

633 Seafood Restaurant Inc

INDEX NO. 606626/97

MOTION DATE 12/14/04

MOTION SEQ. NO. 3

MOTION CAL. NO.

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

FILED
MAR - 8 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3/5/05

RICHARD B. LOWE III
J.S.C.

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
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MARION SAKOW, suing on behalf of herself and in the right of 633 SEAFOOD RESTAURANT, INC.,

Plaintiff,

Index No. 606626/97

-against-

633 SEAFOOD RESTAURANT, INC., ALICE CUTLER, individually and as Executrix of the ESTATE of ARTHUR CUTLER, BARRY CORWIN, HOWARD LEVINE and 2427-2429 SEAFOOD RESTAURANT CORP.,

Defendants.

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Hon. Richard B. Lowe, III:

Defendants 633 Seafood Restaurant, Inc. (633), 2427-2429 Seafood Restaurant Corp. (2427), Barry Corwin (Corwin), and Howard Levine (Levine) move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint.

This is a shareholders' derivative action in which plaintiff claims that certain officers and directors of the corporation paid themselves excessive compensation, and improperly used corporate funds to pay for attorneys to defend certain litigation described below.

In 1985, Arthur Cutler (Cutler), Corwin and Levine formed 2427 and opened Docks Oyster Bar & Seafood Grill on the West Side of Manhattan (Docks I). Cutler, Corwin, and

Levine collectively are referred to as the Managing Shareholders. According to the defendants, Cutler controlled the overall design and business aspects of Docks I, while Corwin and Levine were responsible for day-to-day-operations. In return, the Managing Shareholders each received compensation in the form of salaries and consulting fees.

In 1987, Corwin and Levine formed 633, and opened a second Docks Restaurant on the East Side of Manhattan (Docks II). Cutler invited Marion Sakow (M. Sakow) and her husband Walter Sakow (W. Sakow) to help fund the construction of Docks II.

W. Sakow claims that before Docks II opened, he had discussions with Cutler regarding the compensation to be paid by 633. At the 1994 trial of an action in which the Sakows alleged that 633 had breached the agreement under which M. Sakow had invested money in 633 (Walter & Marion Sakow v 633 Seafood Rest. Corp., Sup Ct, NY County, Index No. 18260/90, hereinafter referred to as the Investment Action), W. Sakow indicated that he had discussions only with Cutler regarding the agreement for M. Sakow to invest in 633. At the inception, the shareholders of 633 were Cutler (33 1/3%), Corwin (16 2/3%), Levine (16 2/3%), and M. Sakow (33 1/3%).

The Sakows received distributions from 633 from 1989 through 2002 (when Docks II was sold), of approximately $700,000. Distributions were made in proportion to the shareholders' respective interests in 633. Neither M. Sakow nor W. Sakow participated in the day-to-day operation of Docks II, and M. Sakow was generally a passive investor after the construction stage. According to plaintiffs, W. Sakow has managed M. Sakow's business affairs, and M. Sakow professes to have relatively little knowledge of the operations of 633.

M. Sakow loaned $1,195,000 to help fund the construction of Docks II. 633 borrowed

additional sums from Cutler, Corwin, Levine, and a third party. The construction loans were repaid by 1996. Loans taken out by 633 to pay off the construction loans were repaid by 1998.

In September 1989, the directors of 633 held a board meeting, at which Cutler, Corwin, and Levine were present, as well as the Sakows and the Sakows' attorney. The subject of compensation for Cutler, Corwin, and Levine was raised and voted upon. Corwin and Levine had been receiving salaries but Cutler had not. Cutler, Corwin and Levine voted for a $240,000 bonus to be divided among themselves, but M. Sakow voted against this compensation. The $240,000 figure, according to defendants, represented approximately 3 percent of the previous year's gross sales of $ 8 million. Although the Investment Action was already pending, the Sakows did not amend the complaint in that action to allege violations with respect to payment of compensation to Cutler, Corwin, or Levine.

In 1994, the Investment Action went to trial, and a jury determined that all of the money which the Sakows advanced to 633 was a loan, but that the Sakows still retained an equity interest in 633. It was as a result of that verdict that 633 ultimately repaid the construction loan.

In June 1997, Cutler died. Alice Cutler, his wife (Alice), succeeded to his interest. She received life insurance proceeds from an Officers' Policy which had been paid for by 633. In return for the payment of life insurance proceeds, Alice was supposed to tender her shares back to 633. The Sakows then claimed that they owned 50% of 633, and demanded that Corwin and Levine remove themselves from the management of Docks II.

In December 1997, M. Sakow commenced the instant shareholders' derivative action. The first cause of action alleges that, despite receiving $3 million in insurance proceeds, Alice failed to tender her shares back to 633. Alice has since tendered her shares back to the

corporation, so that this cause of action is now moot. The second cause of action alleges that Cutler, Corwin and Levine were in complete domination and control of 633, but by their positions as directors and officers of 633, they had a fiduciary duty to deal fairly and in good faith in the management and control of 633. It is claimed that Cutler (prior to his death), Corwin and Levine misappropriated funds belonging to 633 by paying themselves excessive compensation, causing 2427 to misappropriate funds belonging to 633, improperly using funds of 633 to pay life insurance premiums for the officers and directors of 2427, and improperly using funds of 633 to defend lawsuits brought by plaintiff against 633. In a letter dated February 22, 2005, and in e-mails exchanged between the parties, plaintiff agreed to limit her case to two issues: (1) excessive compensation, and (2) improper payment by 633 of legal fees in connection with the defense of actions brought by plaintiff against 633. Plaintiff currently alleges that Cutler (up until 1997), Corwin, and Levine received several million dollars in excessive compensation, and performed relatively few actual services, since, according to her, Docks II had a staff which handled the day- to-day operation of the restaurant.

Several other lawsuits are relevant to this motion. Plaintiff commenced an action for dissolution of 633, pursuant to Business Corporation Law (BCL) § 1104 (Application of Marion Sakow for the Judicial Dissolution of 633 Seafood Restaurant, Inc., Sup Ct, NY County, Index No. 600627/97, referred to as the First Dissolution Action). She claimed to that as a result of Cutler's death and the reversion to 633 of the shares owned by Cutler, she now owned 50% of 633. In February 1998, in the First Dissolution Action, Justice Lewis Friedman denied plaintiff's application for appointment of a receiver and for an accounting. In November 1998, Justice Cozier dismissed the petition for dissolution, converted it to one for a buyout under BCL §§

1104-a and 1118, and directed plaintiff to file a note of issue and to schedule a valuation hearing. The basis for the dismissal was that M. Sakow did not own the required 50% of the shares to commence the action, because Cutler had sold 1% of 633 to a man named Tsu Yue Wang (Wang Sale). M. Sakow did not file the note of issue or appeal from Justice Cozier's decision.

In October 2001, plaintiff moved before this court for permission to sell Docks II, and for a valuation hearing. Although, by this time, Justice Cozier's decision was deemed abandoned in the absence of any attempt to settle an order before him, this court nevertheless upheld Justice Cozier's decision, and granted permission for the sale of Docks II. Plaintiff appealed and applied to the Appellate Division for a stay of the order of this court. The Appellate Division denied the stay, and the sale of Docks II closed in January 2002.

In January 2002, plaintiff moved for leave to renew and reargue the order of this court on the ground of new evidence regarding the validity of the Wang Sale. Specifically, plaintiff contended that the sale to Wang was subject to the approval of the New York State Liquor Authority (SLA), and that plaintiff had only recently learned that the SLA had denied approval. On April 16, 2002, this court denied the motion for reargument, finding that plaintiff had more than enough time to conduct an inquiry into the facts concerning the SLA matter (see transcript, page 19-20, Exhibit J to the affidavit of Victor Rivera, Esq., submitted in support of the motion).

In August 2002, the Appellate Division affirmed the order of this court insofar as it dismissed the petition for dissolution. The Appellate Division, however, held that this court did not have the power to convert the BCL § 1104 proceeding into one under BCL § 1104-a.

In August 2002, plaintiff commenced another proceeding seeking dissolution of 633 under BCL § 1104 (Application of Marion Sakow for the Judicial Dissolution of 633 Seafood

Restaurant, Inc., Sup Ct, NY County, Index No. 119225/02, known as the Second Dissolution Action). That action is still pending before this court.

In September 2002, plaintiff commenced an action to rescind the January 2002 contract of sale of Docks II (Sakow v 633 Seafood Rest., Inc., Sup Ct, NY County, Index No. 603393/02, referred to as the Rescission Action). In June 2003, this court granted summary judgment dismissing the Rescission Action. The Appellate Division, First Department affirmed the judgment.

Plaintiff has brought numerous claims alleging conversion and misappropriation of assets in the past. One of these involved a corporation known as Columbia Bagels, Inc., in which Cutler was one of the principals. Another Justice of this Court dismissed plaintiff's claims, finding that there was no proof that Cutler had converted or misappropriated Columbia's funds for their personal use. Moreover, the Court directed that plaintiff and her counsel be sanctioned by reason of their conduct in delaying the trial of that action by asserting unreasonable claims that could not be proven. A hearing on sanctions was held, and an award of more than $100,000 in costs and expenses was issued(Sakow v Columbia Bagel, Inc., NYLJ. Dec. 13, 2004, at 18, col. 1 [Sup Ct, NY County 2004]).

Movants contend that the action is barred by the six year statute of limitations. CPLR 213(7) provides for a six-year statute of limitations in an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty, or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith. The six-year statute of limitations thus applies where breach of fiduciary duty is alleged (Sardanis v

Sumitomo Corp., 279 AD2d 225 [1st Dept 2001]), or where misappropriation of corporate assets is alleged (Toscano v Toscano, 285 AD2d 590 [2d Dept 2001]). The statute of limitations is six years even if the complaint is construed to be in breach of contract (CPLR 613 [2]).

Movants assert that, ever since the September 1989 board meeting, at which compensation for Cutler, Corwin and Levine was approved by a 3-1 vote (M. Sakow casting the opposing vote), M. Sakow was aware of the compensation being paid to Cutler, Corwin and Levine. Thus, movants argue that plaintiff was required to bring the action no later than September 1995. Since plaintiff did not commence the action until December 1997, more than eight years later, defendants maintain that it is now barred by the statute of limitations.

In Airco Alloys Division, Airco Inc. v Niagara Mohawk Power Corp. (76 AD2d 68 [4th Dept 1980]), the Court said that, where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew, so that accrual occurs continuously and plaintiff may assert claims for damages occurring up to six years prior to the suit. Thus, those portions of a claim which relate to breaches occurring more than six years before the commencement of the action are barred, while those breaches occurring less than six years before the commencement of the action are timely (Stabulas v Brooks Piece Dye Works Corp., 111 AD2d 803 [2d Dept 1985]).

In Barash v Estate of Spuler, 271 AD2d 558 [2d Dept 2000]), where a complaint by a alleged joint venturer alleged that the defendants wrongfully withheld profits, the Court held that the allegations set forth a continuing wrong which accrued anew each time the defendants collected income and profits from the property and failed to give the proper percentage to the plaintiff. The court said that, as to any such proceeds retained by defendants during the

applicable statute of limitations periods prior to the commencement of the action, the claims were timely.

Plaintiff states that she intends to limit her claims of excessive compensation to amounts paid to Cutler, Corwin, and Levine from 1992 forward, all of which fell within the six-year period prior to the commencement of the action. The statute of limitations does not begin to run until a cause of action accrues, i.e., when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court (Aetna Life & Cas. Co. v Nelson, 67 NY2d 169 [1986]). Plaintiff argues that in 1989, 1990, or 1991, she could not have obtained relief in court for wrongful payments that Cutler, Corwin, and Levine may have been planning to cause 633 to make to them in 1993, 1994, and forward. Even assuming the continuing cause of action cases apply, the Court however dismisses on the basis of ratification and, as discussed below, on laches.

However, defendants maintain that plaintiff ratified the salaries and compensation paid to Cutler, Corwin, and Levine by failing to take previous legal action to stop the payments. In the dismissed First Dissolution Action, Justice Friedman held, in denying plaintiff's claim for a temporary receiver and an immediate accounting, that the Sakows had "access to the corporate records for years and made no previous objections to the operation of the corporation" (page 2 of Justice Friedman's decision, Exhibit C to the Rivera affirmation). Defendants contend that this finding bars plaintiff from attacking the compensation paid to Corwin, Levine, and Cutler. It is true that Justice Friedman's ruling related only to the application for temporary relief, and did not constitute a definitive finding on the merits. However, there is no question that plaintiff was well aware of the corporate finances. Plaintiff cites Tierno v Puglisi (279 AD2d 836 [3d Dept 2001]),

where the Court held that mere silence by a minority shareholder did not constitute a ratification of and acquiescence in the payment of excessive salaries to the majority shareholder. In that case, there were no corporate meetings or discussions with respect to the increase in the majority shareholder's salary, and the minority shareholder became aware of the salary increases after the fact, and did not have the opportunity to object. In the instant case, however, a corporate meeting was held on the issue of salary in 1989. Although plaintiff did voice her objection to the increase at that time, she never followed through with a lawsuit on the issue until 1997. Thus, despite her voiced objection, she can be said to have ratified the compensation by failing to take any action to stop it.

Defendants' reply brief raises the defense of laches. Although defendants did not use the word "laches" in the original brief, they did indicate that they were raising equitable considerations and ratification in addition to the statute of limitations. This placed plaintiff on reasonable notice that laches would be asserted as a defense. This court, therefore, will consider the defense of laches on the merits. In Saratoga County Chamber of Commerce v. Pataki 100 NY2d 801 [2003], cert. denied, 540 US 1017 [2003]), the Court discussed the doctrine of laches. Laches and limitations are not the same. Limitations involve fixed statutory periods within which actions must be brought, while laches signifies a delay independent of the statute of limitations. Laches is an equitable bar, based upon lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party. The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches. On the other hand, the defense has been applied in equitable actions and declaratory judgment actions (both of which are governed by the six-year statute of limitations) where the defendant shows prejudicial delay, even though the limitations

period was met. Even where a party registers a protest to a particular corporate action, laches may apply where that party fails to take steps to prevent the action (see Greenfield v Denner, 6 AD2d 864 [1st Dept 1958]).

In the instant case, although plaintiff registered a protest in 1989 by voting against the compensation sought by Cutler, Levine, and Corwin, she lulled them into a false sense of security by not taking any legal action to challenge the compensation for eight years. Plaintiff had corporate financial statements and tax returns available to her, but failed to take any legal steps to prevent the compensation from being paid. Even assuming arguendo that the financial statements did not give a complete picture as to the precise figures of compensation, plaintiff clearly knew that substantial compensation was being paid to Cutler, Corwin, and Levine. Plaintiff has not offered an adequate explanation as to why she failed to act for such a long period of time. Had plaintiff acted earlier, Cutler, Corwin, and Levine could have made an informed decision as to whether to defend their compensation or whether to reduce their compensation down to a level acceptable to plaintiff. Even though plaintiff argues that in 1989, she was not in a position to challenge compensation to be paid to Cutler, Corwin, and Levine in future years, a reasonably prompt legal action could have resulted in relief that would have set the parameters for compensation (if any, other than shareholder distributions) to be given to Cutler, Corwin, and Levine in the years that were then yet to come. Plaintiff's delay thus resulted in prejudice to the defendants.

In light of the above, this court concludes that, even assuming that the claim for excessive compensation is timely under the statute of limitations, it is barred under the doctrines of ratification and laches.

Even if this court were to consider the claim of excessive compensation on the merits, plaintiff would have serious problems of proof at trial. To the extent that plaintiff claims that she or her husband had any oral agreement with Cutler relating to compensation for Cutler, Corwin and Levine, it appears that the Dead Man Statute, CPLR 4519, would bar such testimony, since such testimony would be adverse to Cutler's Estate.

Plaintiff fares no better as to her claims relating to the use of corporate funds to defend lawsuits brought by her against the corporation. Corporate officers have broad discretion to prosecute lawsuits on behalf of a corporation, or to defend lawsuits on behalf of a corporation, even where the dispute is among insiders rather than one between the corporation and third parties (West View Hills, Inc. v Lizau Realty Corp., 6 NY2d 344 [1959]). Moreover, officers or directors can use corporate funds to pay legal fees in corporate litigation, in the exercise of good faith and business judgment (Twelve Lions Renaissance Corp. v 684 Owners Corp., 157 AD2d 577 [1st Dept 1990], appeal denied 76 NY2d 704 [1990]).

Although plaintiff ultimately prevailed in the Investment Action, this court notes that the action was against 633 only, and that no corporate funds were used to defend Cutler, Corwin or Levine personally. The laches defense applies to plaintiff's challenge to the use of corporate funds to defend the Investment Action, inasmuch as the Investment Action was pending for a long period of time, yet plaintiff did not challenge the use of corporate funds to defend the action until several years after the action was over. Plaintiff should have demanded at a much earlier stage that Cutler, Corwin, and Levine reimburse 633 for legal fees expended in the defense of the Investment Action; had she done so, Cutler, Corwin, and Levine could have obtained a ruling from the court before the legal bills continued to accumulate.

Although the Rescission Action and the First Dissolution Action took place after the instant lawsuit was commenced, and the statute of limitations and the laches defenses does not apply to legal fees expended by 633 in those actions, plaintiff's case as to those legal fees still lacks merit. The Rescission Action ended with a determination in defendants' favor. The First Dissolution Action also ended in defendants' favor, at least insofar as it was found that plaintiff did not own sufficient shares to maintain the action. Although plaintiff continues to argue that the judgment in the First Dissolution Action is suspect by reason of alleged misrepresentations made by defendants regarding the Wang Sale, this court has previously considered and rejected any attempt to challenge the validity of the Wang Sale. To the extent, if any, that the legal fees claim relates to the Second Dissolution Action, the claim is premature, since the Second Dissolution Action is still pending.

In light of the above, this court finds that plaintiff's remaining claims lack merit, so that defendants 633, 2427, Corwin and Levine are entitled to summary judgment. CPLR 3212 allows the court to grant summary judgment to any party. Since the claims against the Estate of Cutler relating to the alleged payment of excessive compensation, and relating to the allegedly improper payment by 633 of legal fees incurred in the defense of actions against 633, are based on the same legal theories as the claims against Corwin and Levine, the claims against the Estate of Cutler must also be dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment is granted, and the complaint is dismissed as against all defendants, with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 4, 2005

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.