SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

In the Matter of the Application of JOHN MARCIANO,

Petitioner-Plaintiff,

for a Judgment pursuant to Business Corporation Law § 1104-a, dissolving CHAMPION MOTOR GROUP, INC., d/b/a Bentley of Long Island,

INDEX NO.: 001264/2006
MOTION DATE: 08/07/2007
MOTION SEQUENCE: 007 & 008

Respondent,

-and-

GARY BRUSTEIN, MICHAEL TODD, 115 SOUTH SERVICE ROAD, LLC, BENTLEY LONG ISLAND, LLC, GOLD COAST LUXURY AUTO, LLC, BTM GROUP, LLC, CHAMPION MOTOR SERVICE, INC., CHAMPION AUTO BROKERS, INC. and CHAMPION LEASING GROUP, INC.,

Additional Respondents-Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed..... 1
Defendants' Statement of Material Facts As To Which There Is No Issue To Be Tried..... 2
Notice of Cross Motion, Affirmation, Affidavits & Exhibits Annexed..... 3
Petitioner's Statement Pursuant to Rule 19-a of the Commercial Division Rules..... 4
Exhibits to Affirmation in Support of Plaintiff's Cross Motion for Partial Summary Judgment, Volume I of II..... 5
Exhibits to Affirmation in Support of Plaintiff's Cross Motion for Partial Summary Judgment, Volume II of II..... 6
Respondents' Response to Petitioner's Rule 19-a Statement of Uncontested Facts..... 7
Affidavit of Gary Brustein dated 7/25/07..... 8

Motion pursuant to CPLR 3212 and 3126 by the defendants-respondents for: (1) summary judgment dismissing the petition/complaint insofar as interposed against Champion Motor Group, Inc., d/b/a Bentley of Long Island; and (2) an order striking the plaintiff's complaint pursuant to CPLR 3126[3], or alternatively, for an order compelling the plaintiff to produce stated documentary materials.

Cross motion pursuant to CPLR 3212 by the plaintiff-petitioner John Marciano for partial summary judgment dismissing the defendants-respondents' second and fourth affirmative defenses sounding in estoppel and unclean hands.

As set forth in this Court's September 5, 2006 and June 15, 2007 orders, this is a contentiously litigated, "hybrid" action and proceeding commenced by the plaintiff John Marciano ["Marciano" or the "plaintiff"] for, *inter alia*, dissolution of various corporate entities, including the respondent Champion Motor Group, Inc., d/b/a Bentley of Long Island ["CMG"].

Among other things, Marciano alleges that the individual defendants Gary Brustein and Michael Todd, both principals in the Champion entities, have engaged in oppressive and exclusionary conduct toward him within the meaning of Business Corporation Law § 1104-a, thereby entitling him to an order of dissolution.

The plaintiff's combined petition and complaint further demands, *inter alia*, an accounting , as an individually asserted claim and derivatively on behalf of the Champion entities, and also alleges that the individual defendants breached their fiduciary duty to him (Cmplt., ¶¶ 66-71).

As documented by this Court's prior orders, Marciano asserts in sum, that he holds what

he has repeatedly described as 38% "beneficial" interest in CMG – although, as this Court initially noted in its September 5, 2006 order, CMG's "governing, corporate documents do not identify * * * [the plaintiff] as a shareholder, director, officer – or a principal of any sort * * *."

More particularly, Marciano contends that prior to entering into the dealership agreement, the parties agreed, among other things, that he would receive a 38% beneficial interest in the newly acquired Bentley dealership – the so-called "handshake" agreement. Marciano claims it - his interest - is substantiated by a variety of documents establishing that the defendants and the Champion entities repeatedly recognized his status as owner and held him out as such, to various third parties including the Bank from which they sought financing and Bentley itself (Calica Aff., ¶ 3).

The defendants in response, have taken the position that the plaintiff lacks standing to maintain a dissolution action under BCL § 1104-a since, as to CMG, he does not own the requisite, twenty percent shareholder interest therein. Notably, CMG is a wholly owned, subchapter "S" subsidiary corporation of codefendant Champion Leasing Group ["GLC"].

It is undisputed that Marciano holds no stock in CMG, which actually owns and operates the dealership, and only a nominal 1% interest in GLC.

In support of their claim that Marciano is not a shareholder, beneficial or otherwise in CMG, the defendants assert that at all relevant times, and in accord with the parties' express design, CLG (which is also a qualified, subchapter "S" corporation) has always owned 100% of CMG, Marciano therefore owns no stock at all in CMG (Stark Aff.,¶¶ 1, 7-14; Rosenblatt Aff.,¶¶ 2-3).

Not surprisingly, that the precise import and meaning of the GLC-CMG parent-subsidiary relationship, and the parties' ownership interests therein, are hotly disputed by the parties – although both sides agree the arrangement was motivated in part by potential tax considerations, including the alleged need to shelter or offset CMG's profitable income from taxation by exploiting GCL's previously incurred losses (Stark Aff.,¶¶ 9-11; Rosenblatt Aff., ¶¶ 5-6).

According to Marciano, however, the parent-subsidiary structure, together with his

nominal, 1% interest in GLC and/or CMG, did not occur in insolation. Rather, the organizational structure was created by the defendants and their accountants for their own benefit, and constituted only one component of the overall arrangement by which Marciano became involved with the Champion entities (Calica Reply Aff., ¶¶ 3, 14).

More particularly, Marciano claims that GLC-CMG entities were so fashioned as an accommodation. Both Todd and Brustein had incurred substantial "carry forward losses, phantom income and other liabilities associated" with "their own prior leasing business" for which: (1) they effectively agreed to remain liable through the organizational structure proposed; and (2) for which they would have otherwise been required to reimburse Marciano (Marciano Aff.,¶¶ 7, 10; Calica Reply Aff., ¶ 3 *see,* Stark Aff.,¶ 13).

Nor was this alleged accommodation to the defendants in any sense intended to alter the underlying ownership agreement reached by the parties with respect to Marciano's beneficial interest in the dealership entity (Marciano Aff.,¶ 8).

A related issue which has embroiled the parties in controversy from the outset, is the precise import and significance to be attributed to an unrelated federal criminal prosecution instituted against Marciano for securities fraud, which has been ongoing since 2004, and during pendency of this action.

Specifically, and as detailed in this Court's earlier decisions, in July of 2004, Marciano was indicted by a federal Grand Jury, which issued a multi-count criminal indictment in the United States District Court for the Eastern District of New York (Defs' Exh., "A").

The indictment charged Marciano and others with conspiracy, money laundering, and securities fraud arising out of certain unrelated stock transactions and demanded the forfeiture of sums exceeding some $16 million.

In December of 2005, and based in part upon the then-pending indictment, the defendants elected to bar Marciano from Champion's business premises and preclude him from participating in its day-to-day operations.

According to the defendants, in light of the allegedly damaging fall-out from the indictment, they supposedly "had no choice but to remove * * * [Marciano] from the day-to-day

operations of the business' since 'no reasonable businessman would expect to continue dealing with lenders or the public on behalf of a Bentley franchise while awaiting trial on a major felony fraud indictment'"(Brustein Aff., ¶¶ 47, 62-63; Sept. 5 Order of Warshawsky, J., at 8).

Marciano has since pleaded guilty to Count I of a superseding federal indictment and admitted during his plea colloquy that, *inter alia*, he "agreed with others to launder the proceeds of a securities fraud" (P. 12-13).

Prior to the entry of Marciano's plea, however, this Court had declined to accord determinative import to the charges as a complete justification for the defendants' exclusionary conduct, at least within the context of the defendants' pre-discovery, motion to dismiss pursuant to CPLR 3211.

More particularly, in its September 5 order this Court observed, among other things, that "the defendants do not dispute that they terminated the plaintiff's involvement in the business, but rather, assert that their actions were reasonable as a matter of law since they were undertaken for an entirely legitimate business purpose, *i.e.*, to curtail allegedly damaging repercussions and concrete economic injury flowing from the plaintiff's December, 2004 criminal indictment" (Brustein Aff., ¶¶ 47, 62).

The Court determined, however, that based upon the evidence then submitted, "any conclusion relative to the claimed propriety and reasonableness of the defendants' exclusionary conduct must await further factual development through discovery in the underlying action" since, *inter alia*, "the purportedly negative impacts relied upon by the defendants were "in part anecdotal in nature" and questions existed "as to the accuracy and intensity of the claimed negative impacts identified by the defendants" (Order at 13).

The Court also reviewed the defendants' claims relative to the plaintiff's standing and his nominal interests in CLG/CMG, and similarly concluded that "unresolved factual issues exist with respect to precisely what sort of ownership and/or shareholder rights – if any – the parties actually intended the plaintiff to possess upon his involvement in Champion" (Sept. 5, Order at 11).

Discovery has progressed, and the defendants now move for: (1) summary judgment

dismissing the cause of action for dissolution with respect to CMG; and for (2) further relief pursuant to CPLR 3126 striking the plaintiff's complaint, or alternatively, compelling Marciano to produce stated documents and materials.

The defendants argue that dismissal is warranted upon the ground that, as a matter of law, Marciano is neither a legal nor beneficial owner of shares in CMG, and therefore lacks standing to maintain a dissolution proceeding pursuant to BCL § 1104-a (Stark Aff., ¶¶ 2-6; 7-24).

The defendants further assert that the plea agreement and/or Marciano's admission of criminal conduct, now fully support their decision to exclude him from Champion's business activities – thereby removing this factual theory as one upon which Marciano can rely in support of his dissolution cause of action.

Marciano opposes the defendants' application and cross moves for partial summary judgment dismissing the second and fourth affirmative defenses, sounding in unclean hands and estoppel.

Viewing the evidence "in the light most favorable to * * * [the plaintiff], as is appropriate in the context of * * * [a] motion for summary judgment" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106 [2006]; *Mosheyev v. Pilevsky*, 283 AD2d 469), the Court concludes that the defendants' motion for summary judgment should be denied. The plaintiff's cross motion, however, is granted.

With respect to the plaintiff's standing and alleged shareholder status, it has been held that "the mere fact that * * * [a party] was never formally issued stock certificates or that * * * [he or she] did not physically possess stock certificates or a shareholder agreement" does "not preclude [a] finding that he had the rights of a shareholder" (*Blank v. Blank*, 256 AD2d 688, 693; *Dissolution of C & M Plastics Inc.*, 194 AD2d 1020, 1021 *accord, French v. French*, 288 AD2d 256; *Benincasa v. Garrubbo*, 141 AD2d 636, 638 *see also, Purnell v. LH Radiologist, P.C.*, 228 AD2d 360, 362, *affd,* 90 NY2d 524 [1997]; *Matter of M. Kraus, Inc.*, 229 AD2d 347, 348; *Hunt v. Hunt*, 222 AD2d 759, 760 *Serdaroglu v. Serdaroglu*, 209 AD2d 600 *see generally*, 11 Fletcher Cyclopedia Law of Private Corporations, § 5094).

Here, while the defendants assert – as they have previously claimed – that Marciano

owns no stock in CMG and possesses at best, a minimal interest in CLG, the additional documentary evidence submitted does not warrant a departure from this Court's prior holding. With respect to Marciano's claimed ownership interest in CMG, this Court's prior conclusion to the effect that "unresolved factual issues exist with respect to precisely what sort of ownership and/or shareholder rights, if any, the parties actually intended the plaintiff to possess upon his involvement in Champion" and CMG (Sept. 5, Order at 11).

Specifically, there is documentary evidence in the record, including the defendants' own deposition testimony, which supports Marcinao's assertion that the parties intended him to be, and indeed treated him as if he were, a shareholding owner of CMG.

Among other things, Marciano's opposing, documentary submissions indicate that both Brustein and Todd admitted in their respective depositions that an oral or "handshake" agreement was reached with respect to Marciano's claimed interest in CMG; that distributions were later made in conformity with that oral agreement and the 38% share referred to by Marciano (*see,* A. Pet. ¶ 46[b]); that Marciano filed Federal 1099 forms and thus paid taxes on the foregoing distributions (Brustein Dep., 130-132; 139-140; 146-147; Todd Dep., 41, 44-45; 210-211 [July 17 Dep]; Calica Aff., ¶¶ 2-3; Seltzer Aff.,¶¶ 12-13); that Marciano made substantial monetary contributions and advances to the Champion entities in the expectation that he would receive the ownership interest in CMG on which he relies; and that the Champion entities openly held out to others, that Marciano was indeed a major shareholder in the corporations, as evidenced by the underlying dealership agreement itself, which describes Marciano as holding a significant, "voting" shareholder interest in CMG (Pltff's Exh., "M"; Brustein Dep., at 124; 166-167).

Moreover, Marciano has submitted documents drafted by, or submitted to, North Fork Bank, which further buttress the claim that, when it was beneficial for them to do so, the defendants apparently represented to the bank, as well as to Bentley, that Marciano was indeed an owner/prinicpal in the key Champion entities (Plttff's Exhs., "D", "E").

Last, while the defendants have offered their account of the CLG-CMG parent-subsidiary relationship and its attendant ownership structure, Marciano has credibly argued that the parent-subsidiary structure was a device formulated exclusively by the defendants and their accountants

for their own benefit, and was incidental to, and in no sense intended to impact or dilute, the overarching ownership agreement reached by the parties including his interest in the dealership (Calica Aff., ¶¶ 12, 24, 29).

The record suggests that the defendants themselves blurred the distinction between the two corporations. Certain requisites of corporate formality were not consistently adhered to (*e.g.*, Pltff's Exh., "K"). Indeed, it is undisputed that no stock ledger was maintained for either GLC or CMG and that no shares in either entity were issued during the relevant time periods (*see*, Brustein Dep., 74-75).

In sum, the Court agrees that under the unusual circumstances presented, the manner in which the CLG-CMG entities may have been structured, organized and owned, is not conclusive of whether Marciano possesses the requisite, beneficial ownership interest in CMG so to confer standing to maintain the subject dissolution proceeding (Calica Aff., ¶¶ 15, 33[b]-38]) (*cf., Matter of Steward*, 229 AD2d 500, 501 *see also French v. French, supra*, at 256; *Porco v. Catherwood*, 32 AD2d 983).

The Court similarly declines to assign determinative import to the newly entered plea, pursuant to which the defendant admitted guilt to certain charges unrelated to the conduct of the subject business.

The defendants claim that Marciano's plea now definitively establishes that he possess no legitimate interest in remaining an active player in the Champion entities (*Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 72-73 [1984]), particularly in light of the Bentley dealership agreement which authorizes termination upon a principal's conviction of a crime (Stark Reply Aff.,¶ 2-4).

According to Marciano, however, the defendants have from the inception, cynically utilized the indictment as a pretext to demonize and then oust him from the Champion entities, while simultaneously attempting to steal and misappropriate his 38% interest in the CMG (Calica Aff., ¶¶ 12-13).

Although the Bentley dealership agreement authorizes termination of the dealership if, *inter alia*, (1) a dealership principal is convicted of a crime; and (2) if, "in Bentley's opinion" the

conviction will adversely affect the dealer's or Bentley's good will or reputation, the defendants have not tendered evidence in admissible form indicating that termination is imminent or even currently under consideration based upon communications or statements from Bentley (Todd Dep., at 79-84; Pltffs' Exh., "U").

In this respect, Marciano has submitted the deposition testimony of Todd in which Todd advised that, to the extent any feedback has been received from Bentley, Bentley has been noncommittal and/or "not passed judgment" on Marciano's indictment (Pltff's Exh., "U"; Todd Dep., at 79-84).

To the extent that materials reflecting the tenor of Bentley's reaction have been submitted, they tend to buttress this conclusion. In particular, Marciano notes – as he did in connection with prior motion practice – that in early 2006, the defendants themselves allegedly attempted to prod Bentley into taking a position on the indictment, which, according to Marciano, "Bentley refused to do, much to the defendants' chagrin" (Calica Reply Aff., ¶ 13).

Specifically, the record contains a January 3, 2006 letter from a Bentley representative responding to an earlier, December, 2005 letter written by the defendants, in which the defendants apprised Bentley of Marciano's pending indictment (Pltff's Exh., "W").

Bentley's responsive letter acknowledges the information provided by the defendants with respect to the indictment. However, to the astonishment of the defendants (*see* January 6, 2006 Letter of Brustein/Todd), Bentley's letter did not expressed shock or disapproval, but actually praises Marciano stating that, "[t]he purpose of this letter is to let you know that we have always respected John's professionalism as well as the business and financial acumen which we believe he brought to the dealership" (Bentley Jan. 3, 2006 Letter; Pltff's Exh., "W").

Additionally, the "criminal misconduct" cases relied upon by the defendants are not dispositive in the Court's view, since among other things, it appears that the wrongdoing at issue in those matters involved perpetration of acts either against the corporation, or within the course of the corporation's business activities (*e.g.*, *Matter of O'Neill*, 214 AD2d 736, 738; *In re Maybaum*, 6 Misc.3d 1019(A) Slip Opn., at 4 [Supreme Court, Nassau County 2005]; *Gimpel v. Bolstein*, 125 Misc.2d 45 [Supreme Court, Queens County 1984]).

Accordingly, the defendants' motion for summary judgment dismissing the dissolution cause of action insofar as asserted in connection with CMG, is denied.

Marciano also cross moves to dismiss the defendants' second and fourth affirmative defenses sounding in unclean hands and estoppel, defenses which are pleaded in conclusory form, without accompanying and/or explanatory factual averments (*see generally, Plemmenou v. Arvanitakis,* 39 AD3d 612; *Petracca v. Petracca*, 305 AD2d 566, 567; Ans.,¶¶ 7, 9). The cross motion should be granted.

Notably, "[t]he unclean hands doctrine rests on the premise that one cannot prevail in an action to enforce an agreement where the basis of the action is "immoral and one to which equity will not lend its aid" (*Muscarella v Muscarella*, 93 AD2d 993). The doctrine is generally applicable " when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (*Kopsidas v. Krokos*, 294 AD2d 406, 407).

It is settled that, "[t]he person seeking to invoke the doctrine of unclean hands has the initial burden of showing, prima facie, that the elements of the doctrine have been satisfied" (*Fade v. Pugliani/Fade*, 8 AD3d 612; *Kaufman v Kehler*, 5 AD3d 564), and "conclusory allegations are insufficient to support" the defense (*Clifton Country Road Associates v. Vinciguerra*, 195 AD2d 895).

With respect to estoppel, the "[t]he purpose of * * * [the doctrine] is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted" (*Shondel J. v. Mark D.*, 7 NY3d 320, 326 [2006] *see also, Town of Hempstead v. Incorporated Village of Freeport,* 15 AD3d 567, 570; *First Union Nat. Bank v. Tecklenburg,* 2 AD3d 575, 577).

Preliminarily, and while this Court previously declined to dismiss the complaint based upon the defendants' "unclean hands" theory, it clearly expressed doubt as to the viability of the defense (Sept., 5 Order at 9-10).

This Court held that, "the defendants have not established as a matter of law that they sustained the requisite, proximately ensuing injury within the meaning of the 'unclean hands' doctrine, *i.e.*, injury which flows directly from the plaintiff's purportedly inequitable and immoral conduct".

The Court also observed that "[t]o the extent that relevant injury flowed from Marciano's conduct, the injury, if any, is as likely inflicted upon those from whom the assets were allegedly hidden – not the defendants who apparently raised no objection to the manner in which the plaintiff s ownership interest in * * * [CMG] and CLG was to be reflected * * *" (Sept. 5 Order at 10).

Current circumstances do not warrant a departure from the Court's previous assessment of the defendants' unclean hands theory.

Indeed, the defendants' opposing submissions are attenuated, conclusory and fall short of demonstrating that either defense is viable on this record.

Specifically, the defendants' theorize that an estoppel or unclean hands defense arises because: (1) Marciano withheld disclosure of the indictment from Bentley, and in turn, subjected the dealership to possible termination; and (2) that the simple act of advancing his "beneficial ownership" theory, has now supposedly subjected the defendants and their accountants to potential criminal liability and, additionally, exposed CMG to substantial tax liability in the event his claim is credited (Stark Reply Aff., ¶¶ 8-10).

Even assuming that the basic elements of the foregoing defenses exist – and this Court has already suggested in its prior order that they do not (Sept., 5 Order at 10-11) – there is nothing in the record supporting the strained theory that Marciano's purported withholding of information from Bentley, information Bentley has long possessed at this juncture anyway, implicates the concepts of estoppel or unclean hands.

Nor has it been credibly established, under the circumstances presented, how the mere assertion of Marciano's beneficial interest provides support for either defense (*see generally, Whalen v. Gerzof*, 206 AD2d 688 690-691; *Burack v. I. Burack, Inc.*,137 AD2d 523, 526-527; *Gunzberg v. Art-Lloyd Metal Products Corp.*, 112 AD2d 423, 425).

The Court notes that the defendants have not cited, much less analyzed and reviewed, any legal authority demonstrating precisely how their theories fit within, or are supported by relevant case law principles governing the application of the challenged defenses (*e.g.*, Stark Reply Aff., ¶¶ 8-10).

That branch of the defendants' motion which is for an order striking the complaint pursuant to CPLR 3126[3], or alternatively, for an order compelling the plaintiff to provide stated discovery materials, is granted to the extent indicated below.

Initially, and as to that branch of the motion which is to strike the plaintiff's complaint, that remedy may be granted only where the conduct of the resisting party is clearly shown to be willful and contumacious. That showing has not been made here (*e.g.*, *1523 Real Estate, Inc. v. East Atlantic Properties,* 41 AD3d 567; *Gateway Title and Abstract, Inc. v. Your Home Funding, Inc.*, 40 AD3d 919).

It is well settled that the nature and degree of the sanction, if any, to be imposed on a motion pursuant to CPLR 3126 rests within the broad discretion of the motion court (*Nieves v. City of New York,*, 35 AD3d 557, 558; *Jenkins v. City of New York,* 13 AD3d 342).

However, that branch of the motion which is to compel document production is granted to the extent that the parties shall appear before the undersigned for a conference on October 19, 2007, at 2:30 P.M., during which the Court shall review and consider the discovery demands and claims which are currently outstanding.

The Court has considered the parties' remaining contentions and concludes that they do not warrant an award of relief in excess of that granted above.

Accordingly, it is,

ORDERED that the plaintiff-petitioner's cross motion pursuant to CPLR 3212 for partial summary judgment dismissing the defendants-respondents' second and fourth affirmative defenses, is granted, and it is further,

ORDERED that the motion pursuant to CPLR 3212 by the defendants-respondents for summary judgment dismissing the petition/complaint insofar as interposed against Champion Motor Group, Inc., d/b/a Bentley of Long Island, is denied, and it is further,

ORDERED that the branch of the defendants' motion which is for an order striking the plaintiff's complaint pursuant to CPLR 3126[3], or alternatively, for an order compelling the plaintiff to produce stated documentary materials, is granted to the extent that the parties shall appear before the undersigned for a conference on October 19, 2007, at 2:30 P.M., during which the Court shall review and consider the discovery demands and claims which are currently outstanding or remain outstanding by that date.

The foregoing constitutes the decision and order of the Court.

Dated: September 19, 2007

J.S.C.