

**Carlson v Doerrig**

2007 NY Slip Op 34562(U)

February 5, 2007

Supreme Court, New York County

Docket Number: 600673/06

Judge: Herman Cahn

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

PRESENT: HERMAN CAIN Justice

PART 49

Index Number : 600673/2006

CARLSON, JUSTIN

vs  
DOERRIG, INKA

Sequence Number : 001

DISMISS ACTION

C

INDEX NO. \_\_\_\_\_

MOTION DATE 10/30/06

MOTION SEQ. NO. 201

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were \_\_\_\_\_ is motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

FILED

FEB - 9 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 21 5 107

Her Cain

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
JUSTIN CARLSON,

Plaintiff,

-against-

Index No. 600673/06

INKA DOERRIG; INKA INC.,

Defendants.

-----X  
CAHN, J.

**FILED**  
FEB - 9 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants' move to dismiss the complaint for ~~CAHN, J.~~ state a claim, the running of the statute of limitations, and plaintiff's lack of standing, CPLR 5211.

It is alleged in the complaint that plaintiff Justin Carlson and defendant Inka Doerrig were business partners, and shareholders and directors in defendant, Inka Inc., f/k/a Vital Eyes, Inc., a closely held corporation. Defendant Doerrig allegedly froze plaintiff out of the business affairs of Inka, Inc., and has failed to distribute partnership profits, or to reimburse him for his expenses or to repay a loan he extended to the corporation.

The complaint further alleges that Carlson was a designer and inventor in the biotechnology field in March 1998, when he and Doerrig entered into an "Agreement to Create a Partnership" (the Agreement). Pursuant to the Agreement, the parties were to market a certain "eyepack" which Carlson claims to have invented. Doerrig produced and marketed the eyepack. The item is alleged to have been trademarked by Carlson and

Doerrig and marketed as “Pearl Ice.” In February 1998, the parties incorporated “Vital Eyes, Inc.” to further promote the eyepack.

Carlson and Doerrig’s interests in both the partnership and the corporation were split 25/75. In April 2000, the corporation issued five shares of stock to Carlson and 15 shares to Doerrig, at \$1 par value. Then, in May 2000, Vital Eyes, Inc. changed its name to “Inka, Inc.” Thereafter, Carlson claims he was frozen out of the corporation by Doerrig, was never remunerated or reimbursed for his costs, and the loan he had extended to the corporation was not repaid. In sum, Carlson claims that he was oppressed by Doerrig as a shareholder, director and an officer for a five-year period.

Carlson further alleges, on information and belief, that there were never any shareholder or director meetings, nor any accountings performed of the corporate books and records, and no record of corporate payments, dividends, or distributions made.

In January 2005, Carlson demanded the right to inspect the books and records of the partnership and Inka, Inc. Doerrig noticed a shareholder meeting to be held on March 1, 2005, at her attorney’s office. Carlson was permitted a limited inspection of the books and records, but was not permitted to make copies of any documents.

In four causes of action, the complaint alleges that Doerrig breached the Agreement, breached the fiduciary duty she owed to Carlson as a partner, used her dominant position in the corporation to her own advantage and failed to account to Carlson for profits made on sales of the eyepack.

Doerrig seeks dismissal of the complaint, asserting: that the statute of limitations has expired, since the partnership terminated more than six years ago, in 1999, when the corporation was formed; lack of specificity in the claim for breach of fiduciary duty; and failure to state a claim for an accounting, pursuant to Business Corporation Law (BCL) § 624. Further, argues Doerrig, the complaint fails to properly allege: that a partnership was ever created or that the partnership had any profit; that Carlson made a proper demand for an accounting as required by BCL 624; or which payments, expenses or dividends went unpaid. Finally, Doerrig claims that the damages that have been alleged, in the amount of \$250,000, are entirely conclusory.

On a motion to dismiss for failure to state a cause of action, it “is well established that in determining whether to grant such a motion, the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any discernible legal theory.” *Sheila C. v Povich*, 11 AD3d 120, 122 (1st Dep’t 2004) (internal citations omitted).

Doerrig claims that the first cause of action, for breach of the partnership agreement, is barred by the six-year statute of limitations governing contract actions. Doerrig asserts that the partnership, which defendants claim was terminable at will, terminated upon the formation of the corporation, in 1998, more than seven years before this action was commenced. In support of this contention, Doerrig cites *Weisman v*

*Awnair Corp. of America*. 3 NY2d 444 (1957). Carlson counters that the parties' intent was for the partnership to survive the creation of the corporation, and that since the plaintiff suffered a continuous wrong, the action is timely.

It would be premature to attempt to resolve the factual issues raised by both plaintiff and defendants at this stage of the proceedings. However, the claim for breach of the Agreement is lacking in clarity with respect to the terms of the Agreement between the parties, or the parties' intentions regarding the continuation of the partnership once the corporation came into existence. The first cause of action is therefore dismissed, with leave to replead in order to clearly state the theory of this cause of action and the facts upon which it is based.

Similarly, it is unclear which of the allegations of the complaint plaintiff intends to prove to establish his claim for breach of fiduciary duty. The second cause of action is also dismissed, with leave to replead.

The third cause of action, for breach of fiduciary duty against Doerrig, as a director and shareholder of the corporation, alleges that Doerrig used her dominant position in the corporation for her own individual advantage, at the expense of Carlson's interests. Although the parties debate whether this is a direct or derivative claim, depending on whether the injury alleged is unique to Carlson, or more properly alleged on behalf of the corporation, this cause of action fails to state a claim for relief. To the extent that Carlson is complaining that Doerrig's conduct breached a duty owed to him, allegations of such

misconduct may be included in the repleaded first or second causes of action, as appropriate. This cause of action is dismissed.

The fourth cause of action, for an accounting, requires plaintiff to plead that a written demand for the inspection of books and records was made upon the corporation, on notice, pursuant to BCL § 624 (b). Since the pleading fails to allege this element of the claim, the fourth cause of action is also dismissed, with leave to replead.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted in part and the first, second and fourth causes of action are dismissed, with leave to replead; and it is further

ORDERED that the third cause of action is dismissed in its entirety; and it is further

ORDERED that the motion is denied in all other respects; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: February 5, 2007

ENTER:

*John Cole*

J.S.C.

**FILED**  
FEB - 9 2007  
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COUNTY CLERK'S OFFICE