

**Davis v SML Realty Holding LLC**

2008 NY Slip Op 30478(U)

February 20, 2008

Supreme Court, New York County

Docket Number: 0602392/2006

Judge: Jane S. Solomon

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PRESENT: HON. JANE S. SOLOMON  
Justice

PART 55

Index Number : 602392/2006  
DAVIS, ROGER D.  
VS.  
SML REALTY HOLDINGS  
SEQUENCE NUMBER : 007  
PARTIAL SUMMARY JUDGMENT

INDEX NO. 602392/2006  
MOTION DATE 12-13-07  
MOTION SEQ. NO. 007  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for Summary judgment

PAPERS NUMBERED  
1-4  
5-8  
9-10

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 is decided in accordance with the annexed memorandum decision and order.

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

**FILED**  
FEB 22 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/20/08

  
JANE S. SOLOMON, 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 55

-----X

ROGER D. DAVIS, a shareholder of  
BUCKLEY FUNERAL HOME, INC., suing in the  
Right of BUCKLEY FUNERAL HOME, INC.,

Plaintiff,

Index No. 602392/06

-against-

SML REALTY HOLDING LLC, LEKERIKA, LLC,  
STELLA LEQUERIQUE, GABRIELLE LEQUERIQUE,  
and the ESTATE OF RICHARD LEQUERIQUE,  
Deceased,

Defendants.

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**FILED**  
FEB 22 2008  
NEW YORK  
COUNTY CLERKS OFFICE

**Solomon, J.:**

This derivative action arises from defendants' alleged wrongful transfer of real estate belonging to plaintiff Buckley Funeral Home, Inc. (BFH). Roger D. Davis (Davis) commenced this action, as an alleged 50% shareholder of BFH, seeking a declaration that BFH is the owner of property located at 445 West 43<sup>rd</sup> Street, New York, New York 10036 (Premises). Davis also seeks an accounting and damages for defendants' alleged waste, neglect and breach of fiduciary duty.

Defendants SML Realty Holdings LLC (SML) and Stella Lequerique answered the complaint. Defendants Gabrielle Lequerique, Lekerika, LLC and the Estate of Richard Lequerique answered the complaint separately, asserting a cross claim against SML and Stella Lequerique for indemnification and contribution.

Davis now moves for partial summary judgment, seeking a declaration of his status as a

shareholder of BFH, an order vacating the Note of Issue dated October 30, 2007, and granting him additional discovery. SML and Stella Lequerique cross-move for summary judgment dismissing the complaint and cross claim.<sup>1</sup>

### Facts

In 1985, Davis and Richard Lequerique were equal shareholders of BFH. Davis was president and a director of BFH. Richard Lequerique was a director, but not an officer. According to Davis, another director was non-party Philomena Quirilo, Richard Lequerique's mother-in-law. BFH purchased the Premises in November 1985, and, since that time, it has operated a funeral home business on the first two floors of the Premises. The higher floors are residential apartments.

In June 1992, Davis ceased working at BFH and moved to Ohio. Davis claims that he ceased taking a salary from BFH at the end of 1991 and worked without pay during the first half of 1992. Thereafter, Richard Lequerique took over the business operations.

Davis claims that, in October 1992, he entered into an agreement with Richard Lequerique, whereby Richard Lequerique bought out Davis's interest in BFH, payable in a 15-year stream of monthly payments (Agreement). Davis claims that the Agreement required him to surrender his 50% shareholder interest in BFH only after BFH completed the stream of payments in 2007.

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<sup>1</sup> The court notes that the notice of motion of SML and Stella Lequerique also request dismissal of counterclaims. However, based upon the papers before the court, there are no counterclaims asserted against these defendants. Therefore, the cross motion is deemed directed against plaintiff's complaint and the cross claim for indemnification and contribution. The court also notes that defendants Gabrielle Lequerique, Lekerika, LLC and the Estate of Richard Lequerique submit no papers in connection with these motions.

Davis admits that the Agreement was never reduced to writing. The only written evidence of the Agreement submitted by the parties includes: a worksheet calculating the price of \$96,118 for the "Buckley Funeral Home buyout @ 7/30/92," prepared by BFH's accountant, Bruce Steinthal (Steinthal); and a schedule of payments prepared by Steinthal, which was allegedly agreed to by Davis and Richard Lequerique (Payment Schedule). DeRight Aff., Exs. C and H. The Payment Schedule is based upon monthly payments of \$1,024.35, beginning in January 1993 and ending in December 2007. Davis claims that he received the \$1,024.35 monthly payments from January 1993 until May 2005, at which point all payments ceased.

Davis claims that, when he left New York in 1992, he did not take any records with him, and that BFH's books and records, including the corporate kit and stock certificates, remained with BFH in New York. Davis admits that, after 1992, he "ceased to be involved in the business of BFH," and that he "was provided no further information regarding, and had no knowledge of, BFH and its business." Complaint, ¶ 14. Davis claims that he nevertheless remained at all times president and a director of BFH, and that he never resigned from either position.

Shortly after Davis stopped receiving payments, he learned that Richard Lequerique was ill. Richard Lequerique died in July 2005. Davis claims that he was informed by Stella Lequerique, Richard Lequerique's widow, that Davis would not receive any further monthly payments.

Thereafter, Davis retained counsel in New York, who searched the public records and, in October 2005, discovered that Richard Lequerique had transferred title to the Premises from BFH to himself, by an instrument dated February 24, 1994, signing the instrument as president of BFH. According to Davis, this transfer of the Premises was undertaken without corporate

authorization and without consideration, and it constitutes a fraudulent conveyance, because the Premises were “the principal asset of BFH.” Complaint, ¶ 25.

Davis claims that, according to the New York County property records, the Premises were then transferred as follows: by deed dated December 14, 2000, from Richard Lequerique to “Richard Lequerique and Stella Lequerique, his wife”; by deed dated June 18, 2004, from Richard Lequerique to Lekerika, LLC (of which Stella and Richard Lequerique were the sole members), signed by Richard Lequerique but not by Stella Lequerique; and by deed dated February 28, 2006, from Stella Lequerique to SML, of which Stella Lequerique is allegedly the managing member. Complaint, ¶ 34.

#### Discussion

Davis seeks a declaration that he is a shareholder, officer and director of BFH. Davis does not challenge that a sale took place, but rather, he argues that the sale did not contemplate the surrender of his shares of BFH until all payments had been completed under the Payment Schedule, which never occurred because payments ceased in May 2005. In opposition, and in support of their cross motion for summary judgment dismissal, SML and Stella Lequerique argue that Davis lacks standing to sue, because he is not a BFH shareholder, and that his claims are barred by the statute of frauds and the statute of limitations.

Section 626 (a) of New York’s Business Corporation Law permits a shareholder of a domestic corporation to bring a derivative action. Therefore, Davis’s status as a shareholder, and, consequently, his standing to bring this derivative action, is a threshold issue that must be resolved before reaching defendants’ alternative grounds for dismissal.

At the heart of Davis’s argument in support of his status as a shareholder are his

assertions in the verified complaint, and in his affidavit, that he did not agree to surrender his shares in 1992, when he entered into the Agreement. Davis claims that his “understanding was that [he] would hold [his] shares until the payments to [him] were completed.” Davis Aff., ¶ 7; *see also* Complaint, ¶ 13 (Agreement required Davis “to surrender his shareholding interest in BFH upon completion of the stream of payments, in 2007. Mr. Davis has not surrendered his shareholding interest in BFI”). Thus, Davis’s alleged shareholder status hinges upon his assertion that, under the Agreement, he never surrendered his shares.

However,

CPLR 4519 disqualifies parties interested in litigation from testifying about personal transactions or communications with deceased ... persons. The underlying purpose of the rule is to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court. The statute prevents any person “interested in the event” from testifying to a “personal transaction” with the deceased unless the representative of the deceased has waived the protection of the statute by testifying himself or introducing the testimony of the decedent into evidence at trial.

*Sepulveda v Aviles*, 308 AD2d 1, 10 (1<sup>st</sup> Dept 2003) (internal quotation marks and citations omitted). “Unquestionably, ‘evidence excludable under the Dead Man’s Statute should not be used to support summary judgment.’” *Acevedo v Audubon Management, Inc.*, 280 AD2d 91, 95 (1<sup>st</sup> Dept 2001) (citation omitted).

Here, Davis’s assertions clearly involve a personal transaction with Richard Lequerique, who is deceased, and Davis is clearly interested in the transaction. Therefore, Davis’s affidavit and deposition testimony on this point are inadmissible. Davis concedes in his reply brief that the Dead Man’s Statute is applicable. Plaintiff’s Reply Mem. of Law, at 5 (stating that “testimony as to what was not discussed with the decedent would be inadmissible here, pursuant

to CPLR 4519”).

Moreover, even if Davis’s statements were not barred by the Dead Man’s statute, the substance of his deposition testimony conflicts with the allegations of Davis’s pleadings. For example, Davis avers in the complaint and his affidavit that he was to hold his BFH shares until the payments under the Payment Schedule were completed. However, this statement is at odds with Davis’s allegation that he left all books and records at BFH when he left New York, including the corporate kit and his stock certificates. In addition, Davis testified at his deposition that he did not recall what he and Richard Lequerique discussed concerning “the detail of whether or not the payments to [Davis] in connection with the buyout was in consideration for [Davis’s] surrender of [his] shares in [BFH.]” *Rutishauser Aff.*, Ex. D, at 38. Therefore, even if Davis’s statements were not barred by the Dead Man’s Statute, they are nevertheless insufficient support for his summary judgment motion, and insufficient to raise a question of fact warranting denial of SML and Stella Lequerique’s cross motion for summary judgment. *Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318 (1<sup>st</sup> Dept 2002) (“a self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded”).

The additional evidence before the court supports SML and Stella Lequerique’s prima facie showing. For example, Richard Gugliotta (Gugliotta), BHF’s corporate attorney who represented BFH in the purchase of the Premises, testified that Davis and Richard Lequerique “together indicated to me that [Richard] would buy out [Davis’s] interest and they asked me to do a promissory note as to the amount that they agreed upon.” *Id.*, Ex. E, at 20. Gugliotta stated, “I remember - a vague recollection meeting at [BFH] where - and I believe the note was signed

and the stock certificates were transferred I believe.”<sup>2</sup> *Id.* When asked whether Davis or Richard Lequerique ever said anything to Gugliotta about Davis retaining any ownership interest subsequent to the date of the buyout, Gugliotta stated that he had “no recollection of anything like that.” *Id.* at 31.

Steinthal testified that “[m]y understanding, my knowledge was that originally the corporation was owned 50/50 by [Davis] and [Richard Lequerique] and at a date, and I don’t recall the specific date, although based on records it would have been October of [1992 that] Richard Lequerique bought out [Davis’s] shares in the corporation.” *Id.*, Ex. F, at 16. Steinthal testified as follows:

Q: Did there come a time when [Davis] sold his interest in [BFH]?

A: Yes ... Again I believe the effective date of it would have been October 1992.

Q: Did he sell all of his interest at that time?

A: Yes.

...

Q: Did he retain any interest in the corporation subsequent to the sale in October of 1992?

A: Not that I know of.

*Id.* at 60. Steinthal also testified that Davis never contacted him to dispute Richard Lequerique’s ownership of the corporation from the 1992 sale to the date of his death (*id.* at 62), and that it was his belief that “Davis did not retain any interest in the corporation” (*id.* at 64).

Furthermore, Davis’s tax returns *after* 1992 report “Installment Sale Income,” identifying September 1, 1992 as the “[d]ate sold” (*id.*, Ex. H), whereas BFH’s post-1992 Schedule K-1s

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<sup>2</sup> The court notes that Gugliotta also testified that he “really ha[d] no independent recollection of it.” *Id.* However, the court’s decision is not based solely on Gugliotta’s testimony, but rather, it is also based upon the testimony of Steinthal and the documentary evidence submitted by the parties, discussed below.

identify Richard Lequerique as BFH's 100% shareholder (*id.*, Ex. I). Steintal testified that he prepared BFH's tax returns, Davis's tax returns while he was in New York, and all post-buyout corporate and personal tax returns for BFH and Richard Lequerique based on Richard Lequerique's 100% ownership of BFH. Davis does not claim that he ever received, or requested, a Schedule K-1 after 1992. To the contrary, he affirmatively represents in the complaint, and in his affidavit, that he "ceased to be involved in the business of BFH," and that he "was provided no further information regarding, and had no knowledge of, BFH and its business." Complaint, ¶ 14; Davis Aff., ¶ 9.

Davis submits as documentary evidence 12 checks that he received in the years 1993, 1994, 1995, 1998 and 1999. Of the 12 checks, the word "mortgage" is handwritten on 8 of them.<sup>3</sup> DeRight Aff., Ex. D. Davis claims that this handwritten notation evidences the understanding between Davis and Richard Lequerique that Davis retained an interest in his shares until all payments had been completed. However, Davis fails to explain how the word "mortgage," by itself, creates a retained interest in his shares of BFH, and he submits no legal authority in support of this argument. Moreover, of the 149 payments that Davis admittedly received, only 8 of them state the word "mortgage," and the most recent of these "mortgage"-marked checks is dated February 13, 1995. Furthermore, of the three most recent checks submitted by Davis, the checks dated February 22, 1998 and January 17, 1999 contain no notation at all, and the most recent check submitted, dated March 15, 1999, contains the handwritten notation, "b[u]y out," which, if anything, supports the conclusion that his shares

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<sup>3</sup> The court notes that the photocopy of check number 1461 is cut off at the bottom, and it is unclear whether this check contains the handwritten "mortgage" notation, and, in any event, this would not change the court's decision.

were, in fact, bought out by Richard Lequerique. *Id.* Therefore, Davis's argument is unpersuasive.

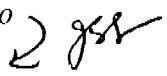
For the foregoing reasons, SML and Stella Lequerique have made a prima facie showing that Davis is not a shareholder of BFH. Davis fails to rebut that showing. Therefore, SML and Stella Lequerique's motion for summary judgment is granted and the complaint is dismissed as to these defendants. While the remaining defendants submit no papers in connection with the motions presently before the court, Davis lacks standing to assert his derivative claims against any of the defendants. Therefore, the complaint is dismissed in its entirety, against all defendants, for lack of standing. The cross claim of Gabrielle Lequerique, Lekerika, LLC and the Estate of Richard Lequerique, for indemnification and contribution, is dismissed as moot.

Furthermore, even if Davis had standing to bring this derivative action, his claims are barred by the statute of frauds. Section 5-701 (a) (1) of New York's General Obligations Law states that an agreement is void if it is not in writing and signed by the party to be charged, if the agreement, by its terms, cannot be performed within one year from its making.

Here, Davis admits that there was no written agreement. According to Davis, the oral agreement, made in 1992, contemplated Richard Lequerique making monthly payments to Davis for 15 years, in exchange for Davis surrendering his BFH shares at the end of the 15-year period. Therefore, this version of the Agreement could not have been performed within one year of its making. *See e.g. LaJaunie v DaGrossa*, 159 AD2d 349, 350 (1<sup>st</sup> Dept 1990) (oral agreement under which plaintiff would receive right to purchase restaurant stock if restaurant were profitable in its first year of operations after renovation, in exchange for plaintiff's contributions in designing, renovating, and managing restaurant, was incapable of being performed within one

year of its making and, thus, agreement was unenforceable under statute of frauds).

Davis fails to cite any legal support for his argument that there was partial performance, evidenced by installment payments made from 1993 to mid-2005. In any event, that argument is without merit, where, as alleged by Davis, there is only partial performance by one party. *See e.g. Tip Top Farms, Inc. v Dairylea Co-op.*, 114 AD2d 12, 32-33 (2d Dept 1985), *affd* 69 NY2d 625 (1986) (“[a]lthough complete performance by both parties will take a contract out of this statute [citations omitted], it is well settled in New York that neither partial performance by both parties nor complete performance by only one party will save an agreement that cannot be performed within a year”).

Davis’s claims are also time-barred. The alleged fraudulent conveyance of the Premises took place on February 24, 1994, and this action was not commenced until July 6, 2006. Therefore, the first cause of action for unlawful divestment of realty is time-barred under the one-year statute of limitations contained in section 909 (c) of New York’s Business Corporation Law. The second cause of action for an accounting is barred by the six-year statute of limitations contained in CPLR 213 (1). *Lazides v Kouzounas*, 7 AD3d 676, 677 (2d Dept 2004). The third cause of action for waste, neglect and breach of fiduciary duty is also barred by the six-year statute of limitations. *Blake v Blake*, 225 AD2d 337, 337 (1<sup>st</sup> Dept 1996) (shareholder derivative action alleging corporate waste and breach of fiduciary duty subject to six-year statute of limitations under CPLR 213 [7]); *see also*  *Kaufman v Cohen*, 307 AD2d 113, 118 (1<sup>st</sup> Dept 2003) (stating that six-year statute of limitations applies, under CPLR 213 [1], to claim for breach of fiduciary duty where relief sought is equitable).

Davis argues that CPLR 213 (8) applies to this action, and that he timely commenced this action within two years of October 2005, when he claims to have discovered the alleged fraudulent conveyance. However, “[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant’s misrepresentations.” *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 (1<sup>st</sup> Dept 1997). Moreover, “a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament.” *Rodas v Manitaras*, 159 AD2d 341, 343 (1<sup>st</sup> Dept 1990). Here, Davis affirmatively argues that he remained president, a director and a 50% shareholder of BFH during the entire period from 1992 to present. Therefore, had he exercised any diligence at all as an officer, director and shareholder, he would have discovered the alleged fraudulent conduct, at the latest, in 1995 or 1996, upon the annual meeting of shareholders, directors or officers. *See e.g.* BCL §§ 602 (b), 703 (a) and 715 (c). Therefore, Davis’s argument is unpersuasive.

Accordingly, it is hereby

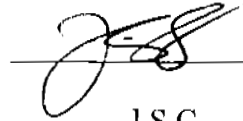
ORDERED that the plaintiff’s motion for partial summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment is granted and the complaint, and the cross claims of defendants Gabrielle Lequerique, Lekerika, LLC and the Estate of Richard Lequerique, are dismissed with costs and disbursements to defendants 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: 2/20/08

ENTER:



J.S.C.

JANE S. SOLOMON

CLERK OF SUPREME COURT

**FILED**  
FEB 22 2008  
NEW YORK  
COUNTY CLERKS OFFICE