IstDibs.com, Inc. v Forcione

2008 NY Slip Op 31918(U)

June 26, 2008

Supreme Court, New York County

Docket Number: 0100935/2005

Judge: Emily Jane Goodman

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SCANNED ON 7/7/2008

[* 1]

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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 100935/2005

ISTDIBS.COM

VS

FORCIONE, LAURENCE

Sequence Number : 011

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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 Decided per

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 6/26/08

EMILY JANE GOODMAN 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 17

----------X

1STDIBS.COM, INC.,

Plaintiff,

-against-

Index No.: 100935/05

LAURENCE FORCIONE and MICHAEL J. BRUNO II,

Defendants.

----------X

MICHAEL J. BRUNO II,

Third-Party Plaintiff,

-against-

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

WILLIAM J. HOLLOWAY, JANE ALEXANDER AND 1STDIBS.COM, INC.,

Third-Party Defendants.

----------X

EMILY JANE GOODMAN, J.:

This case involves the parties' dispute over the management and control of a business, 1STDIBS.COM, INC. (the Company), established by third-party plaintiff Bruno and third-party defendant, Holloway, and incorporated in Delaware in March 2000. In this motion, sequence number 11, Bruno seeks summary judgment on the first cause of action of the third-party complaint. In that cause of action, Bruno seeks a determination that actions taken at a special shareholders meeting (the Meeting) were invalid, and that he is the Company's president. He further seeks an order enjoining Holloway from exercising authority, or holding himself out, as the Company's president and third-party defendant Alexander, currently an employee of the

Company, from doing the same, but as the Company's secretary. Holloway swears that he is the Company's president and chairman and Alexander its shareholder, director, and secretary (Holloway Aff., at 1). In their fourth counterclaim, third-party defendants seek a declaration that, among other things, the acts taken at the Meeting were valid.

While Alexander and Holloway have monetary claims against Bruno for conversion, breach of fiduciary duty and tortious business interference in connection with, among other things, Bruno's alleged conduct in locking out Alexander and Holloway from the Company's business and financial affairs, at issue in this motion is the validity and effect of actions taken at the Meeting, which was held on December 20, 2004.[1] At the Meeting, Alexander and Holloway distributed shares of the Company to themselves, and elected directors and appointed officers. Bruno maintains that the actions taken at the Meeting were unlawful and a nullity. Alexander and Holloway disagree.

The Company was incorporated through a kit (the Corporation Kit). Holloway admits, in fact he swears, that he was responsible for coordinating the incorporation. The Company's certificate of incorporate states that the Company was authorized to issue one hundred thousand shares with a par value of $.01 (Rosenthal Aff., Exh. 7), and provides the Company's board of directors (the Board) with the power to adopt, amend or repeal the Company's bylaws.

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[1] Although this case is decided on Delaware corporate law and principles, the court has met with the parties and the subtext of this dispute, one of many lawsuits in which Holloway and Bruno have engaged, concerns people who once cared about each other, managing to build something together, who now draw themselves, and others, into a bitter, prolonged and undoubtedly expensive endeavor. The court's part in this dispute is limited to the interpretation of bylaws, statutes, and common law, the end result of which will resolve some legal issues, but, ultimately, likely satisfy no one.

Bruno swears that in or around December 2000, he and Holloway retained a California attorney, Julie Finley, to help take care of some outstanding corporate housekeeping matters. To that end, Finley prepared, and Bruno and Holloway signed, as the Company's directors, a document entitled "Action by Unanimous Written Consent of Directors," dated January 23, 2001 (the Resolution). The Resolution indicates that Bruno and Holloway are the Company's only directors and states that they are acting unanimously, without a meeting, pursuant to Delaware General Corporation Law (GCL) § 141 and "Article III, Section 13 of the Bylaws of the Corporation" (Rosenthal Aff., Exh. 8). The Resolution appoints Bruno as the Company's president, CEO, and secretary, and Holloway as its vice-president and chief financial officer (CFO), but contains no other appointments. Bruno swears that Finley's office prepared bylaws for the Company, dated January 23, 2001 (Finley Bylaws), which he and Holloway adopted through the Resolution. The Resolution states that the Board approved the bylaws of the corporation. The parties deposed Finley, who identified the Finley Bylaws as those in the Company's minute book.

Although Holloway signed the Resolution, he swears that he did not see or sign the Finley Bylaws at that time, and that his understanding when he signed the Resolution was that he and Bruno were adopting the bylaws provided in, and which he read when he received, the Corporation Kit (Kit Bylaws). Holloway swears that he never agreed to, and does not now, recognize the Finley Bylaws. Holloway further swears that he generally viewed the Kit Bylaws as the Company's official bylaws, but also states that the Company never followed corporate formalities, or the Kit Bylaws or Finley Bylaws.

Third-party defendant Alexander began working with the Company in May 2000. Holloway swears that she did so without compensation for the first year and a half. It is undisputed that Bruno and Holloway sent Alexander a letter, on March 12, 2001, which states, among other things:

> "we will initially offer you a 3% ownership interest in the company. Subsequently after two years from the start date of your agreement, we will offer you the opportunity to have another 3% ownership in the company in lieu of receiving any further commissions.
>
> This offer is subject to a final contract being prepared and executed. As we are still setting up the infrastructure of 1stdibs.com, we are still exploring the details involved in issuing stock, therefore, we will need you [*sic*] cooperation and patience, but are very excited to make this offer to you and look forward to concluding an agreement with you as soon as possible"

(Rosenthal Aff., Exh.13). Holloway swears that in exchange for Alexander's services, he and Bruno offered her a six percent ownership interest in the company (three percent at the outset and an additional three percent after two years). He further swears that the Company orally finalized Alexander's employment agreement with her in 2001, and that she performed all of her duties and obligations thereunder (Holloway Aff., ¶ 31).[2]

It is undisputed that Finley circulated a proposed shareholders' agreement during 2002 and 2003, which included shareholder interests for Alexander, and two other Company employees, Forcione and Gast. Also undisputed is that no such agreement was signed and that an employment agreement with Alexander was also drafted but not signed.

On December 9, 2004, Alexander wrote a letter to Holloway and Bruno in which she states that she is confirming her acceptance of the offer in the March 12, 2001 letter (Rosenthal

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[2] In his affidavit, Holloway refers to an affidavit by Alexander that is not part of this record.

Aff., Exh. 20). Alexander's December 9, 2004 letter states that her ownership interest in the Company totals six percent.

Bruno submits a document that Holloway signed, as a Company shareholder and admittedly self-appointed chairman of the Board, that is entitled "Notice of Special Meeting of Shareholders" and dated December 9, 2004 (the Notice). The Notice states that a meeting of the Company's shareholders was to be held on December 20, 2004, the purpose of which was to (1) issue stock certificates to the Company's existing shareholders; (2) elect directors to the Board; and (3) convene a board meeting to appoint the Company's officers (Rosenthal Aff., Exh. 21). Holloway swears that he called the Meeting because it had become apparent to him and Alexander that the Company's assets were being misappropriated and its finances mishandled by Bruno.

Bruno swears, and third-party defendants do not dispute, that Holloway did not discuss with him: (1) the Meeting or that he intended to call a shareholders' meeting; (2) that Holloway was of the view that Alexander had become a shareholder and had agreed with her to recognize her as such; or (3) that Alexander and Holloway planned to obtain control of the Company's management. Also undisputed is Bruno's sworn statement that Holloway did not seek to raise any of the proposed actions with him in advance of sending the Notice. It is further undisputed that prior to the Meeting, Bruno's lawyer, Michael A. Bucci, wrote to Holloway objecting to it, and stating that Alexander was not a shareholder.

On December 19, 2004, Holloway signed a document entitled "Subscription Agreement" (Subscription Agreement), as a director of the Company, pursuant to which Alexander purported to purchase 6,000 shares of stock from the Company for $10. Holloway swears that as an

officer, director and shareholder of the Company, he was authorized to enter into the Subscription Agreement, thereby fulfilling the Company's obligations to Alexander by agreeing to issue to her stock certificates representing the six percent ownership interest in the Company that third-party defendants claim she had earned. Holloway also signed another subscription agreement in which he purported to purchase 47,000 shares of Company stock for $10. Alexander signed that agreement on behalf of the Company, as a director, but testified that she could not recall whether she was a Company director on December 19, 2004, and did not really understand what the position entailed.

There is no evidence that the consideration described in either agreement was paid. Bruno characterizes Alexander and Holloway's conduct as a secret pact in which, in exchange for Alexander's agreement to vote her shares to oust Bruno, Holloway agreed to unilaterally recognize her status as a shareholder.

It is undisputed that on December 20, 2004, at the Meeting, which Bruno did not attend, Alexander and Holloway purported to elect themselves and Bruno as directors of the Company, and to appoint Holloway as its president and Alexander as its secretary. In addition, Alexander and Holloway distributed stock certificates for the Company's shares—to Bruno and Holloway, each for 47,000 shares, and to Alexander for 6,000 shares.

Bruno contends that Holloway's lawyer, Rubman, was present at the Meeting and claimed to be acting as counsel to the Company and as "Inspector of Elections." Holloway swears that Rubman was then the Company's attorney, and that at the Meeting Rubman confirmed that the Notice was appropriate under the Kit Bylaws, Finley Bylaws § 4, and Delaware law. Bruno states that he did not approve Rubman's retention as counsel for the Company, and that Rubman, as Holloway's personal attorney, improperly provided legal advice

to the Company with respect to matters about which Holloway and Bruno had adverse interests. Neither party disputes that at the Meeting Rubman advised Holloway that Bruno's objections to the Notice were without merit, and that Alexander was entitled to vote as a shareholder.

Holloway states that he and Alexander together represented 53% of the total outstanding shares of the Company. Holloway further states that because he and Alexander had concerns about Bruno's alleged involvement in unauthorized money transfers, forged checks and usurped business opportunities, Bruno was not on the list of nominees for an officer position.

The parties do not dispute that a majority of the outstanding shares of the Company are required to constitute a quorum at a shareholders meeting. Holloway does not dispute that he signed, and the Company adopted, the Resolution. Also undisputed is that prior to the Meeting, the directors did not hold regular Board meetings or, other than the Resolution, take action by written consent, that no annual shareholder or director meetings were held, that the Board did not approve the issuance of shares to Alexander or the Subscription Agreement, and that no share certificates were issued for the Company. Holloway swears that the fact that the Company had never issued stock certificates did not cause him or Bruno to question their own ownership rights in the Company.

Bruno swears that Holloway had not previously acknowledged Alexander as a shareholder, and consistently identified himself and Bruno as the sole and equal owners of the Company. Holloway does not dispute this contention and, at his examination-before-trial (EBT) testified that until 2004, he held himself and Bruno out as equal owners.[3] In their verified

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[3] The Company's tax returns for 2002 and 2003, filed by Holloway, list Bruno and Holloway as each owning 50% of the Company.

pleading, Alexander and Holloway admit that prior to December 20, 2004, Bruno and Holloway were each 50% shareholders of the Company (Rosenthal Aff., Exh 2 [Am. Ver. Ans.], ¶ 1).

In April 2005, the first-party action was settled. Bruno represents that the parties then stipulated that he would continue to manage the Company during the pendency of the third-party action, subject to prompt disclosure of all financial activities to Holloway. Third-party defendants state that Bruno continues to control the business over their objection.

On June 2, 2008, while this motion was pending, the court decided motion sequence number 14 and issued an order appointing a temporary receiver for the Company. The decision on that motion contains additional details on Bruno and Holloway's relationship throughout this litigation, and before, which will not be repeated here.

For a movant for summary judgment to establish a prima facie case, it must provide sufficient admissible evidence eliminating material issues of fact from the case or the motion will be denied (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in a light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]) and accord that party the benefit of reasonable favorable inferences (*Gurfein Bros. v Hanover Ins. Co.*, 248 AD2d 227, 229 [1st Dept 1998]). Where a movant has met its burden, summary judgment may not be defeated by "conclusions and unsubstantiated assertions" (*Zuckerman*, 49 NY2d at 562), or mere conjecture, surmise, or speculation.

Bruno argues that he is entitled to summary judgment on the first cause of action because: (1) the Notice was not timely and did not meet the requirements of the Finley Bylaws as Holloway did not request, but rather scheduled the Meeting; (2) the Board did not authorize the issuance of shares or the subscription agreement, and therefore Alexander was not a

shareholder, and the quorum requirement necessary to conduct the meeting was not met; and (3) Alexander was not a shareholder of record as of the record date, and was thus was not entitled to participate in or vote at the Meeting.

In opposition, third-party defendants argue that the Company's shares were duly issued, its Board elected, and its officers appointed at the Meeting. They further argue that summary judgment should be denied because there are contested legal issues surrounding Bruno's allegations requiring a factual inquiry and determination, including: (1) whether the Meeting was validly noticed and conducted, including whether the parties waived the record date requirement; (2) which set of bylaws were applicable and whether the applicable bylaws were waived by an inconsistent course of conduct; (3) whether Alexander had a valid and binding contractual right to shares in the Company; and (4) whether Holloway acted with actual or apparent authority in granting shares to Alexander. Third-party defendants argue that Holloway's affidavit raises fact issues regarding whether the Finley Bylaws were formally adopted by the Board, whether Holloway and Alexander made the secret pact Bruno alleges, and whether Rubman was Company counsel for purposes of the Meeting.[4]

Based on these contentions and arguments, third-party defendants argue that every prong of Bruno's motion rests on a disputed fact. The court disagrees.

It is undisputed that Delaware law applies here, and GCL § 213 provides that to determine which shareholders are entitled to vote, a corporation's board may set a record date, and where it does not do so, it is the day *preceding* the date of the meeting's notice. Only

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[4] Third-party defendants contend that there are disputed factual issues concerning whether Holloway told Bruno in advance that he intended to call a shareholder's meeting, but Holloway does not dispute this assertion in his affidavit.

shareholders of record (Record Owners) may vote at shareholder meetings. Record Owners are shareholders whose holdings are recorded on the corporate books on the record date. The Finley Bylaws permit the Board to set a record date by resolution, but the record date may not precede the resolution date (Rosenthal Aff., Exh. 23, Art. II, § 11 [a]). The Kit Bylaws also permit the Board to fix a record date not less than ten days before a meeting of stockholders (*id.*, Exh. 24, Art. V, § 5.6).[5]

Third-party defendants do not dispute that Alexander was not a Record Owner on the record date, and material facts not disputed on summary judgment are deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *Arteaga v 231/249 W 39 Street Corp.*, 45 AD3d 320, 321 [1st Dept 2007]). In addition, third-party defendants' admission in their verified pleading that Bruno and Holloway were each 50% owners of the Company up until December 19, 2004 does not leave room for Alexander as a shareholder on the record date. Thus, pursuant to either set of bylaws, or Delaware law, Alexander was not a Record Owner on the record date, and therefore was not entitled to vote as a shareholder at the Meeting.

Third-party defendants contend that the record date requirement should be disregarded because Bruno and Holloway did not manage to attend to the most basic of corporate formalities,

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[5] The Kit Bylaws also permit a special meeting to be called by the president, chairman of the board, or upon the request, in writing, of a stockholder of at least 50% of the issued and outstanding voting shares of the Company's stock. Regardless of whether Holloway met the notice requirements of the Kit Bylaws, he was not the Company's president, only the self-appointed Board chairman, and did not merely request that a meeting be held. Third-party defendants contend that section 4 of the Finley Bylaws provides for notice, for all meetings, of not fewer than 10 days before the date of the meeting. Bylaws are interpreted with the same rules of construction used in statutory and contract interpretation (FOLK § 109.4, at GCL-I-85 [2007-1 Supplement]). Similar to New York law, Delaware law requires that contracts be interpreted so as not to render provisions meaningless (*O'Brien v Progressive Northern Ins. Co.*, 785 A2d 281, 287 [Del Supr 2001]). As discussed, under the Finley Bylaws, if it was not the Board calling the special meeting, the party seeking the meeting was required to submit a request that the Company do so with at least 30 days notice time. Third-party defendants did not comply with, and essentially ignore, this provision.

such as holding an annual meeting of the shareholders, or issuing stock certificates. While there is case law to support the proposition that bylaws may be amended by implication where the parties engage in a repeated prior course of action demonstrating amendment (*see e.g. Petrick v B-K Dynamics, Inc.*, 283 A2d 696, 699 [Del Ch 1971]), third-party defendants submit no evidence of any prior course of action concerning special meetings, and it is undisputed that none were previously held.[6] Thus, no material issue of fact is raised.

In any event, third-party defendants also raise no material issue of fact as to which bylaws were adopted through the Resolution. As previously discussed, Bruno has submitted his affidavit and the EBT testimony of Finley regarding the bylaws.[7] The Resolution itself contains a reference that could only be a reference to the Finley Bylaws, and not the Kit Bylaws (*see* Rosenthal Aff., Exh. 8, at 1).

At his EBT, Holloway testified that he read the Kit Bylaws when he received the Corporate Kit, in 2000, but did not make use of them, and that while he read the Resolution, he did not then know which version of the bylaws the Board approved, but merely assumed it was the Kit Bylaws based on his having once read them and because he had not read or seen the Finley Bylaws (Holloway Aff., Exh. A, at 619-620). Holloway further testified that he reviewed both sets of bylaws in advance of sending out the Notice, to attempt to establish which was "the

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Assuming, arguendo, the merit of third-party defendants' argument that the parties were all aware of Bruno and Holloway's failure to conduct annual meetings as required in both sets of bylaws, third-party defendants do not make a persuasive argument as to how such conduct would alter notice or record date requirements. Third-party defendants also argue that by Bruno's logic, there were no shareholders as of the record date, a result they call "a ridiculous application" (Third-party Def. Memo. of Law, at 21), despite that they have not provided a single corporate record demonstrating the identity of the Record Owners, or that the Company issued shares. That said, the parties do agree that Bruno and Holloway were shareholders (Am. Ver. Ans., ¶¶ 1-2).

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It is undisputed that Finley was the Company's attorney when the Resolution was adopted.

real version for the Company" (*id.*, at 635). Holloway concluded that the Company adopted the Kit Bylaws because the Resolution states that he acknowledged that he (as part of the Board) had reviewed the general provisions of the bylaws, and he had not seen, or had no recollection of having seen, the Finley Bylaws (Holloway Aff., Exh. A, at 636-637).

There is, however, no evidence that the Kit Bylaws were ever adopted. Holloway's opposition amounts to his belief, or assumption, that the Kit Bylaws were adopted through the Resolution, but he does not provide admissible evidence from which a reasonable inference can be drawn that he has actual knowledge as to which set of bylaws was adopted. Instead, he attempts to rely on his lack of knowledge to raise an issue of fact. Summary judgment is not defeated by an unsubstantiated impression, belief or assumption, however.[8]

In addition, under Delaware law, stock issuance "is an act of fundamental significance . . . having a direct affect on the ownership and control of Delaware entities. The law therefore requires certainty and precision in such matters" (*MBKS Co. Ltd. v Reddy*, 924 A2d 965, 975-976 [Del Ch 2007] *affd* 945 A2d 1080 [Del Supr 2008]). "Technicalities . . . are vital in transactions that affect the corporate form" (*id.* at 975), and the issuance of shares by a corporation effects a change in its ownership structure and may, in turn, change the control structure of the business. "[T]he issuance of shares must be approved by the board of directors acting as a Board at a duly held meeting" (*Linton v Everett*, 1997 WL 441189 *8, 1997 Del Ch Lexis 117 [Del Ch 1997]; Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations § 5.13A [the "statutory scheme envisions a model for the issuance of corporate securities that is premised upon a certain degree of formality, specifically, formal board

[8] Furthermore, that Holloway did not sign the Finley Bylaws is of no moment where it is undisputed that he *did* sign the Resolution. The court notes that Holloway also did not sign the Kit Bylaws.

authorization to issue stock at a duly called meeting of directors, or in lieu thereof, by unanimous written consent" (Note: on-line treatise)]).[9]

It is undisputed that other than in the Resolution,[10] the Board has not formally taken any acts on behalf of the corporation. It is further undisputed that the Board did not authorize the issuance of stock to Alexander, and under Delaware law, *Holloway was not permitted to unilaterally do so*.[11] Delaware law concerning certainty in the corporate structure does not support a director's unilateral issuance of shares. Bruno's statement, that he would also have unilateral authority to cause the Company to issues shares if Holloway has such authority, exemplifies the rationale behind Delaware's law.

Alexander was not a record shareholder, and Holloway alone did not constitute the majority of outstanding shares necessary to achieve a quorum. Accordingly, no directors were

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While Board ratification might in certain situations cure a failure to adhere to formalities for the issuance of stock (*see e.g. Kalageorgi v Victor Kamkin, Inc.*, 750 A2d 531 [Del Ch 1999], *affd* 748 A2d 913 [Del Supr 2000]), there is not so much as an allegation of ratification here.

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Holloway swears that he did not sign the Resolution with any belief that it was required by the Kit Bylaws, and does not even now know if such was required, but does not proffer an argument as to the significance of this assertion where none of the parties have challenged the Resolution's validity.

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Third-party defendants argue that "although the Finley By-Laws grant the Board . . . the power to authorize the issuance of stock, they do not state that this power is to be held exclusively by the board" (Third-party Def. Memo. of Law, at 18), citing to article III, section 1, of the Finley Bylaws, entitled "Directors," which states:

" Section 1. POWERS. Subject to the provisions of the Delaware GCL and any limitations in the Certificate of Incorporation and these bylaws relating to the action required to be approved by the stockholders or by the outstanding shares, the business and affairs of the [Company] shall be managed and all corporate powers shall be exercised by or under the direction of the **Board of Directors**. The **Board of Directors** may, except as otherwise required by law [or] the Certificate of Incorporation, exercise all such powers and do all such acts and things as may be exercised or done by the Corporation.

Without prejudice to these general powers, and subject to the same limitations, the **Board of Directors** shall have the power to:

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(d) Authorize the issuance of shares of stock of the Corporation on any lawful term . . ."

(Rosenthal Aff., Exh. 23, at 4-5 [emphasis added]). This language speaks for itself.

elected at the Meeting. The record does not demonstrate, and third-party defendants do not seriously assert, that Alexander held the position of director prior to the Meeting. As Alexander was not a director, and Holloway alone could not appoint officers (Rosenthal Aff., Exh. 23, Art. III, § 9), he was not appointed as the Company's president at the Meeting, and Alexander was not appointed its secretary. Holloway's contention that he was legally authorized to enter into the Subscription Agreement fulfilling the Company's obligations to Alexander does not change this result. Regardless of any potential claim Alexander may have for an ownership interest in the Company, which will not be addressed here,[12] she was not a Record Owner on the record date.[13]

Remaining is the question of whether Bruno is the Company's president. GCL § 142 (b) provides that:

> "[o]fficers shall . . . hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body. Each officer shall hold office until such officer's successor is elected and qualified or until such officer's earlier resignation or removal."

There is no dispute that prior to the Meeting, Bruno was, at the very least, the "acting President of the Company" (Am. Ver. Ans., ¶ 1). Bruno is entitled to a declaration that he is

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While Alexander seeks to amend the pleadings to add such a claim, she has not been successful to date. The merits of any claim Alexander may have to shares or an ownership interest in the Company based on any agreement or apparent authority does not change the result in this decision.

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Holloway swears that he entered into the subscription agreement with Alexander as the Company's vice president and chief financial officer (CFO), fulfilling the Company's obligations to her by contractually agreeing to issue stock certificates to her representing the six percent ownership interest and that he was legally authorized to do so. Third-party defendants' memorandum of law cites to Holloway's sworn statement to support his claim of legal authorization (Third-party Def. Memo. of Law, at 7). Third-party defendants' argument that the Finley Bylaws, Art. VIII, § 4, permitted Holloway to *sign* stocks on behalf of the Company does not speak to a right to unilaterally enter into a subscription agreement.

currently the Company's president, as reflected in the declaration below,[14] and subject to the court's prior decision concerning the temporary receiver, who will be conducting and overseeing certain of the Company's affairs and functions. Although they have not moved, third-party defendants would not be entitled to a declaration that Bruno is not an officer of the Company or an order that, based on the Meeting, he is "forever enjoined from holding himself out as such or exercising authority over the Company in that capacity" (Am. Ver. Ans., ¶ 122).

As to the rest of his first cause of action, Bruno does not provide sufficient evidence that Alexander is exercising authority, or holding herself out, as a director and secretary of the Company, and summary judgment on the portion of his first cause of action seeking injunctive relief against Alexander is denied. Similarly, Bruno provides no evidence that Holloway is exercising authority on behalf of the Company, and therefore, Bruno has not demonstrated that Holloway should be enjoined in this regard. However, Bruno's request to permanently enjoin Holloway (who represented that he is the president of the Company in this action) is granted to the extent that Holloway is enjoined from representing that he is currently the president of 1STDIBS.COM, INC.

Accordingly, it is

ADJUDGED that the December 20, 2004 special meeting of the shareholders of third-party defendant 1STDIBS.COM, INC. and any acts taken thereat are invalid and third-party plaintiff Bruno is currently the president of 1STDIBS.COM, INC; and it is further

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[14] As the parties seek to quiet a disputed jural relationship, the court, pursuant to CPLR 103 (c), is converting the portion of third-party plaintiff's first cause of action seeking a determination that Bruno is president of the Company to a declaratory judgment.

ORDERED that the motion is granted to the extent that Holloway is enjoined from representing that he is currently the president of 1STDIBS.COM, INC., and is otherwise denied.

This Constitutes the Decision and Order of the Court.

Dated: June 26, 2008

ENTER:

J.S.C.

EMILY JANE GOODMAN

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).