

Votta v Garcy

2009 NY Slip Op 31374(U)

June 15, 2009

Supreme Court, Richmond County

Docket Number: 100548/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

Index No.: 100548/09
Motion No.: 1, 2 & 3

**SAMUEL J. VOTTA, VINCENT J. VOTTA,
JONATHAN S. VOTTA and SUSAN VOTTA,
B&M FITNESS CORP d/b/a FITNESS 2000,
DAVID GRUNBERGER, DUV FELDMAN,
SAMUEL SPUTZ, EVER-NU METAL
PRODUCTS, CO., INC., ROCCO GAGLIARDI,
JOHN D. GAGLIARDI, JOHN A. GAGLIARDI,
FRANK GAGLIARDI, EUGENE GAGLIARDI,
PETER S. FOLINO, CRAIG MURRAY,
EDCA REALTY and EASTERN SECURITY CORP.,
each individually and derivatively as Shareholders of
E-Z Media, Inc. and Atlas Carriers, Inc. suing in
the right E-Z Media, Inc./Atlas Carriers, Inc.**

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**GEORGE GARCY, Individually and as Officer and
Director of E-Z Media, Inc. /Atlas Carriers, Inc.;**
**ANGELO CUOMO, Individually and as Officer
and Director of E-Z Media, Inc./Atlas Carriers, Inc.;**
**JUDITH GUIDO, Individually and as Officer and
Director of E-Z Media, Inc./Atlas Carriers, Inc.;**
EZ MEDIA INC.; ATLAS CARRIERS, INC.;
**MAJESTIC CARRIERS LLC and
WILLIAM GUIDO, individually,**

Defendants

The following items were considered in the review of this motion for (1) preliminary injunction, (2) to dismiss, and (3) for contempt of court

Papers

**Notice of Motion and Affidavits Annexed
Order to Show Cause
Answering Affidavits
Replying Affidavits
Exhibits**

Numbered

Attached to Papers

This court holds the individually named defendants, George Garcy, Angelo Cuomo, Judith Guido and William Guido, along with E-Z Media, Inc. and Atlas Carriers, Inc., in contempt of court for failure to comply with this court's Disclosure, Discovery and Accounting Orders of March 27, 2009, April 24, 2009 and May 8, 2009. This court denies the defendant's motion to dismiss the plaintiff's complaint and their motion for a Temporary Restraining Order and injunctive relief.

This court recognizes the Report of the Shareholder Meeting conducted on May 20, 2009 wherein the plaintiffs, by a majority vote of the shareholders ousted the individual defendants from the Board of Directors and from their positions as officers and representatives of E-Z Media, Inc..

Facts

Plaintiff, Samuel Votta, and the other named plaintiffs, are a group of individuals and corporations which claim to be individually and derivatively shareholders of E-Z Media, Inc. and Atlas Carriers, Inc. The defendants, George Garcy, Angelo Cuomo and Judith Guido, are being sued individually and as officers and directors of E-Z Media, Inc.

E-Z Media, Inc. ("E-Z Media") is a foreign corporation organized under the laws of Nevada and duly authorized to do business in New York. Atlas Carriers, Inc. ("Atlas") is a New York Corporation. Both E-Z Media and Atlas have offices at 50 Beaver Street, New York, New York.

Atlas Carriers is a marketing and distribution company, which supplies methods to advertise for the food and beverage industry, catering to the "Take Home" bottled beverage distribution industry; stadium and arena advertising and event promotion; convenience stores and other mass marketer of cup-borne beverages.

Angelo Cuomo is an inventor of cup holders which were patented, that he assigned to E-Z Media, Inc.

The individual defendants solicited investors on the promise that the capital of the corporation would be used to promote the business and exploit the patented beverage holder cartons to various users. The plaintiffs assert that the defendant solicited \$7 million dollars to be used for business purposes. Cuomo contributed his expertise and the patents to E-Z Media. Apparently, Garcy loaned money to start up the corporations, but has been paid back his financial contributions, plus additional unaccounted for moneys. Judith Guido, who has served as Secretary of the corporations since their inception in 2003, is the sister of Angelo Cuomo. She has testified before this court that she did not maintain the books and records of the corporation and that she does not know of any books or rosters which have recorded the shares of stock issued by her. She further testifies that there has never been either a shareholders' meeting or Board of Directors meeting of either of the corporations since their inception in 2003 through 2009.

Judith Guido testified in court that she issued two stock certificates presented to this court which were dated 2003, which state her brother Angelo Cuomo had 40 million shares in E-Z Media, Inc. and that George Garcy had 20 million shares in E-Z Media, Inc. However, the Certificate of Incorporation only authorizes that 75,000 shares may be issued. The Certificate of Incorporation has never been amended to allow the issuance of more than 75,000 shares.

Judith Guido acknowledged that over the years she received well over \$1 million dollars in her name from the corporations for which she has never paid any taxes. She further claims that she then transferred some of those moneys to her brother, Angelo Cuomo, for whom she claims never paid taxes on such funds. Guido claims she handles the affairs of her brother, Angelo Guido.

Also presented by the plaintiffs at the hearing was a business consultant, Joshua C. Cantor, who stated that in February of 2009 he met with Garcy, Cuomo and others to discuss a business plan for the corporations. At that meeting he claims he was asked by Garcy whether they could back date the issuance of shares of stock for Garcy and Cuomo, to which Cantor stated that they could not. He asserts that he then left the meeting not wanting to participate in such an enterprise.

On cross examination of Cantor, the defense counsel disclosed and Cantor acknowledged that he had settled a civil fraud suit with the U.S. Securities and Exchange Commission involving obtaining millions of dollars involving the American Bank Note Holographics Inc., of which he was President from 1996 through 1998. The disclosure that appears on the internet states in part that, “Cantor without admitting or denying the allegations in the SEC complaint consented to an order permanently enjoining him from violating and/or aiding and abetting violations of the...various securities, laws and the Foreign Corrupt Practices Act.” Cantor consented to a 10 year prohibition from acting as an officer or director of a public company.

Cantor responded that since that time he became a Rabbi and has a very strict ethical code. Once he heard of the intended fraud to be perpetrated of back dating stock certificates, he extricated himself from that meeting with Cuomo, Garcy and others.

Notwithstanding the aforesaid impeachment evidence, this court finds Mr. Cantor’s testimony to be credible. Based upon the facts that the stock certificates issued to Garcy for 20 million shares and Cuomo for 40 million shares are not numbered sequentially as stocks typically are upon issuance so that they may be recorded in a ledger, which Guido, the Secretary, claims she does not maintain and due to the fact that E-Z Media was only authorized to issue 75,000 shares, and based upon the testimony from Cantor that in February of 2009 Garcy was inquiring about back dating the shares of stock, this court finds the shares of stock issued to Garcy and Cuomo to be fraudulent and not evidence of their percentage of ownership in E-Z Media, Inc.

Shareholder Takeover

On May 20, 2009 the plaintiffs, who claim to own 77% of the outstanding shares in E-Z Media, Inc., gathered to take action by written consent. At that shareholders’ meeting the shareholders present: Samuel Votta, Vincent Votta, Jonathan Votta, Susan Votta, who collectively claim to own 52% of the outstanding shares, along with Samuel Sputz, who claims to own 20% of the outstanding shares and Duv Feldman and Shlomo Drazin, who each claim to own 2.5% (5%) of the outstanding shares of E-Z Media, voted to terminate the current Board of Directors: Angelo

Cuomo, George Garcy and Judith Guido. A new Board of Directors was voted in as follows: Samuel Votta, Vincent Votta, Jonathan Votta, Samuel Sputz and Duv Feldman. Thereafter, the new Directors held a meeting and elected a new slate of officers: Samuel Votta as President, Shlomo Drazin as Vice President, Samuel Sputz as Secretary and Jonathan Votta as Treasurer. The officers subsequently voted to terminate the following persons as representatives of the corporation: Angelo Cuomo, George Garcy, Judith Guido, Dan Nelson, Sal Alba and Michael Alba.

Nevada law permits any action to be taken by written consent of a majority of shareholders without formally calling a shareholders' meeting:

“2. Unless otherwise provided in the articles of incorporation or the bylaws, any action required or permitted to be taken at a meeting of the stockholders may be taken without a meeting if, before or after the action, a written consent thereto is signed by stockholders holding at least a majority of the voting power [...]

3. In no instance where action is authorized by written consent need a meeting of stockholders be called or notice given.”¹

Apparently, the foregoing corporate takeover by a majority of the shareholders is valid under Nevada law.² Consequently, under “full faith and credit” this court recognizes the aforesaid Nevada law and gives recognition to that law which recognizes the corporate takeover of E-Z Media, Inc.

¹ Nev. Rev. Stat. §78.320.

² See e.g., *Log Furniture, Inc. v. Call*, 180 Fed.Appx. 785 (10th Cir. 2006) (finding valid a corporate action where no meeting was required); *Nunes v. Columbus Networks Corp.*, U.S. Dist. Ct., NV, No. 04 OC 01066 1B, Apr. 14, 2008 (Trial Court held valid actions by shareholders via Written Consent Resolutions); *State v. Cronan*, 23 Nev. 437, 49 P 41 (1897) (finding that action transacted was valid as it could have been transacted at original meeting).

Notwithstanding the corporate takeover by the plaintiffs, the individually named defendants, George Garcy, Angelo Cuomo, Judith Guido and William Guido, are held in contempt for failure to timely comply with this court's Orders of March 27, 2009, April 24, 2009 and May 8, 2009. Said defendants are given until July 24, 2009 to purge themselves of this court's finding of contempt by fully complying with this court's previous Orders.

Moreover, such named defendants shall fully disclose all of their bank statements, together with copies of cancelled checks and ledgers held by them individually, jointly or in trust for another from 2003 through 2009, and shall fully disclose any brokerage accounts held by them individually, jointly or in trust for another from 2003 through 2009.

The defendants are granted leave to file a late answer to the complaint herein by July 10, 2009.

All named defendants shall be present in court on July 24, 2009 at 2:00 p.m. for a further hearing on purging the finding of contempt and all outstanding discovery matters.

ENTER,

DATED: June 15, 2009

Joseph J. Maltese
Justice of the Supreme Court