

Lemle v Lemle

2009 NY Slip Op 33345(U)

January 9, 2009

Supreme Court, New York County

Docket Number: 601281/047

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 601281/2007

LEMLE, MICHAEL

INDEX NO. 601281/07

vs

LEMLE, FLORENCE

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS ACTION

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are decided in accordance with accompanying memorandum decision.

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

FILED
Jan 20 2009
NEW YORK
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Dated: 1/9/09

[Signature]

BARBARA R. KAPNICK S.C.
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 12

-----X
MICHAEL LEMLE, individually and as a
shareholder of 132 WEST 31ST STREET
REALTY CORP, suing in the name of
132 WEST 31ST STREET REALTY CORP.

Plaintiff,

DECISION/ORDER
Index No. 601281/07
Motions Seq. Nos.
001, 002 and 003

- against -

FLORENCE LEMLE, DOUGLAS LEMLE, DEANNE
LEMLE BOSNAK and 132 WEST 31ST STREET
REALTY CORP.,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

Motions sequence numbers 001, 002 and 003 are consolidated for
disposition.

In this action, plaintiff Michael ("Micky") Lemle,
individually and as a shareholder of 132 West 31st Street Realty
Corp. ("the corporation"), suing in the name of 132 West 31st Street
Realty Corp. seeks to compel the individual defendants Florence
Lemle, Douglas Lemle and Deanne Lemle Bosnak,¹ to account for, and
repay to the corporation several millions of dollars in corporate
assets which they, as controlling members of the corporation's
Board of Directors, allegedly misappropriated or otherwise

¹ Plaintiff Michael Lemle and the individual defendants
are siblings.



converted in breach of their fiduciary duties for their own personal benefit.

Specifically, plaintiff contends that defendants have employed a variety of schemes to enrich themselves, including eliminating millions of dollars in principal and accrued interest that they owe the corporation, paying themselves, as well as their friends and children, hundreds of thousands of dollars in excessive and unearned salaries, fees and bonuses, and using the corporation to pay \$650,000 in personal legal fees and other expenses.

The Verified Complaint asserts claims for: (i) breach of fiduciary duty (first cause of action); (ii) misappropriation and conversion (second cause of action); (iii) fraud (third cause of action); (iv) an independent forensic accounting (fourth cause of action); (v) an accounting of the individual defendants' official misconduct and wrongful diversion of corporate funds and property (fifth cause of action); (vi) a preliminary and permanent injunction barring and prohibiting each of the individual defendants from taking any action to remove plaintiff as an officer or director of the corporation, or taking any action (including the appointment of additional directors to the Board) to dilute or reduce plaintiff's ownership interest in the corporation, his salary and other legitimate fees, distributions, loans and other

benefits, or evicting plaintiff from his office in the building located at 132 West 31st Street (sixth cause of action); (vii) common law dissolution of the corporation, including a collection and distribution of the assets of the corporation (seventh cause of action); and (viii) immediately appointing a temporary receiver to administer the corporation's affairs and to collect its assets pending the dissolution of the corporation (eighth cause of action).

The individual defendants jointly move, under motion sequence number 001, for an order pursuant to CPLR § 3211(a)(1), (2), (5) and (7): (i) dismissing the third through eighth causes of action for failure to state any cause of action; (ii) dismissing or striking all claims arising out of the parties' loan accounts, because such claims are not ripe and plaintiff improperly seeks an advisory opinion from this Court; and (iii) dismissing all of plaintiff's remaining claims alleging "excessive compensation" on the ground that they are barred by the business judgment rule and/or the applicable statute of limitations.²

² Defendants argue that plaintiff's claims regarding defendants' compensation are barred by the applicable three-year statute of limitations (CPLR § 214) and that plaintiff's derivative claims, at least to the extent that they relate to an architect fee paid to Douglas Lemle in 1988 and other conduct which occurred more than six years prior to the commencement of this action, are barred by the applicable six-year statute of limitations (*see, Kaufman v Cohen*, 307 AD2d 113 [1st Dep't 2003]; CPLR § 213[7]).

Plaintiff opposes the motion and cross-moves for an order: (i) pursuant to CPLR § 3025(a) denying the defendants' motion to dismiss as moot on the ground that he filed a Verified Amended Complaint as of right during the pendency of this motion; or in the alternative, (ii) granting plaintiff the due process right and opportunity to respond in full to any new motion to dismiss or in the event that defendants seek to redirect their pending motion to the Verified Amended Complaint.³

The defendant corporation moves, under motion sequence number 002, for an order pursuant to CPLR § 3211(a)(7) dismissing the seventh and eighth cause of action, for failure to state a cause of action.

Plaintiff moves, under motion sequence number 003, for an order: (i) prohibiting and enjoining the individual defendants from utilizing any of the funds or assets of defendant 132 West 31st Street Realty Corp. for the defense of this action and from receiving any indemnification from said corporation for legal fees or other expenses incurred in the defense of this action, pending the final determination of this action; and (ii) directing said

³ The Amended Complaint contains the same eight causes of action as the original Complaint, but includes a few additional factual allegations.

defendants to disgorge and/or repay to the corporation all amounts already so incurred or advanced by the corporation.⁴

The individual defendants oppose the motion and cross-move for court-ordered advancement of their litigation expenses incurred in connection with this action pursuant to BCL § 724(c).

Background

The corporation was founded in 1924 for the purpose of owning and operating an office building at 132 West 31st Street, New York, New York ("the building"). According to the defendants, the corporation continues to own and operate the building, as well as other assets, including real property in upstate New York and Hawaii, and an investment portfolio.

Plaintiff, however, claims that the corporation, through a complex lease transaction, relinquished control and management of the building in 1998. According to plaintiff, the corporation has been essentially a holding company since 1998 with a single asset, an Under Lease, which provides approximately \$3 million in passive revenue each year, and will provide a balloon payment of \$20,000,000 at the end of twenty years, in 2018.

⁴ Financial statements which were distributed on September 18, 2007 at a meeting of the corporation's Board of Directors, indicate that the corporation paid \$220,563.93 in legal fees during the period, May through August 2007.

Plaintiff and the individual defendants are the children of Edna Lemle, whose father founded the corporation. Edna Lemle owns approximately 46% of the outstanding shares of the corporation in her own name.⁵ She is also the income beneficiary of a trust which owns another approximately 31% of the corporation's outstanding shares.

Plaintiff and the individual defendants each own approximately 4.6% of the corporation's outstanding shares. The remaining shares of the corporation are owned in equal amounts by Edna Lemle's grandchildren, including plaintiff's minor son.⁶ There are no non-family shareholders.

Edna Lemle and her four children (i.e., plaintiff and the individual defendants) constitute the board of directors of the corporation. Edna Lemle, who is now approximately 91 years old, served for many years as the President of the corporation, but is currently in frail health. She no longer attends board meetings and does not actively participate in the affairs of the corporation.

⁵ Edna Lemle is the largest single shareholder of the corporation.

⁶ Each of Edna Lemle's grandchildren owns a little over 1% of the corporation's outstanding shares.

Defendant Florence Lemle, who is Edna Lemle's oldest daughter, currently serves as Acting President.⁷

Each director receives \$10,000 for each of the four annual board meeting he/she attends. Each officer, including plaintiff and the individual defendants, receives an additional annual salary of \$50,000, and plaintiff also receives the free use of an office in the Corporation's midtown building for his independent documentary film-making company, a benefit which defendants contend is not extended to his siblings.

Florence Lemle receives, in addition to the base salary of \$50,000 like her siblings, an additional \$125,000 for the work she performs as CFO and acting President of the corporation, a salary which plaintiff contends is excessive for the part time services she provides. Defendants have also received bonuses in the amounts of \$5,000 and \$10,000, which were authorized by a vote of the board of directors, over plaintiff's objection.

According to defendant Florence Lemle, the corporation (which elected subchapter "S" status in 1998) has been profitable since 1999, allowing the corporation, after payment of operating expenses,

⁷ Florence Lemle began serving as Chief Financial Officer in 1992 and later served as Chief Executive Officer.

salaries, directors' fees and other expenses, to make substantial distributions to its shareholders, including plaintiff.

There is no dispute that all four of the Lemle siblings, as well as Edna Lemle, have borrowed money from the corporation over the years. Plaintiff contends that his loan balance has been overstated by the corporation and that the balances for loans extended to his siblings have been understated by the defendants.

Florence Lemle indicates in her Affidavit sworn to on June 29, 2007 that in an effort to resolve the parties' disagreement with respect to the loan accounts, she retained an accounting firm in 2000

to prepare an analysis of all loans received by me and my siblings. That analysis was prepared with the knowledge and consent of all my siblings, including plaintiff. At my request, the accounting firm performed its analysis based on three different sets of assumptions regarding the loans and other benefits received by family members, and prepared three different sets of loan schedules reflecting these assumptions.

She further represents that it was her "hope that my siblings would agree to accept one of the schedules prepared by the accounting firm (or some negotiated variation) as an accurate statement of our loan accounts, and would direct me to adjust the Corporation's books and records accordingly."

Although the schedules prepared by the accounting firm were provided to Florence Lemle's siblings, including plaintiff, no such global agreement was reached. Florence Lemle contends that the analysis of the accounting firm thus "did not result in any changes to the actual books and records of the Corporation."

However, although they were unable to resolve all of their disputes concerning the loan accounts, there is no dispute that plaintiff and the individual defendants entered into a written Modification of Loan Agreement dated June 23, 2004, which resolved certain contested issues. Specifically, the agreement provided for a uniform interest rate of 3.52% to be compounded annually, for each loan regardless of its original terms, effective January 6, 2004. In addition, the agreement provides that the Loan Balances, together with all accrued unpaid interest, shall be determined and payable "on the later of the death of Edna Lemle and the resultant distribution after the probate of her estate or December 30, 2012."

Discussion

As a preliminary matter, defendants dispute plaintiff's claim that their motion to dismiss has been rendered moot by the filing of the Amended Complaint. They contend that the changes contained

in the Amended Complaint are merely trivial and fail to cure the fundamental defects of the original pleading.⁸

The Appellate Division, First Department, has held that "the moving party has the option to decide whether its motion should be applied to the new pleadings." *Sage Realty Corp. v. Proskauer Rose* 251 A.D.2d 35, 38 (1st Dep't 1998). See also, *49 West 12 Tenants Corp. v Seidenberg*, 6 AD3d 243 (1st Dep't 2004).

Thus, plaintiff's cross-motion to deny defendants' motions to dismiss as moot, is denied. The motions shall be applied to plaintiff's Amended Complaint.

Defendants argue that plaintiff's claims arising out of the parties' loan accounts should be dismissed or stricken, because such claims are not ripe. Specifically, defendants argue that there is no present controversy with respect to the loans, since under the terms of the Loan Modification Agreement, no loan payments of any sort are due until at least December 30, 2012.⁹

⁸ Defendants served a Notice of Election dated August 22, 2007 upon plaintiff's counsel electing "to press their pending motion[s] to dismiss against the Verified Amended Complaint."

⁹ There is no dispute that the Loan Modification Agreement governs the loan monies received by plaintiff from the corporation, which, according to defendants, are in the total principal amount of \$700,000.

They argue that any decision this Court renders with respect to the loans will constitute merely an advisory opinion and that the matter would have to be relitigated by the parties in 2013 after the loans become due.

Plaintiff, on the other hand, contends that Florence Lemle keeps duplicate sets of corporate books and records, none of which are accurate.¹⁰ He argues that the absence of accurate corporate books and records presents an actual controversy because he has a present right to pay off his loans which under the express terms of the Loan Modification Agreement are pre-payable without penalty.

Defendants argue in reply that plaintiff knows how much money he borrowed from the corporation and on what terms, and, thus that he can tender repayment accordingly.

Plaintiff, however, has not alleged, nor is there any indication that he ever attempted and/or that he is now prepared to pre-pay his loan. Accordingly, this Court finds that plaintiff's claims arising out of the loan accounts, including those contained in the first and second causes of action, are not ripe for determination.

¹⁰ Florence Lemle vehemently denies this claim. She speculates that plaintiff may be referring to the three schedules prepared by the outside accounting firm which she claims did not result in any change to the books and records of the Corporation.

Defendants next argue that all of plaintiff's claims which allege "excessive compensation", including plaintiff's claims that Florence Lemle's salary is excessive and that Deanne Lemle Bosnak wrongfully received a \$10,000 bonus in 2004, should be dismissed on the ground that they are barred by the business judgment rule¹¹ and/or because they are time-barred.

The issue of whether or not corporate transactions, including those that benefit individual directors personally, provide a benefit to the corporation

is generally committed to the sound business judgment of the directors (citations omitted). The objecting stockholder must demonstrate that no person of ordinary sound business judgment would say that the corporation received fair benefit (citation omitted). If ordinary businessmen might differ on the sufficiency of consideration received by the corporation, the courts will uphold the transaction (citation omitted).

Aronoff v. Albanese, 85 AD2d 3, 5-6 (2nd Dep't 1982).

Although plaintiff contends that the business judgment rule should not be applied to the extent he is ultimately able to demonstrate that the defendants have acted in bad faith and/or in

¹¹ Both Florence Lemle's salary and Deanne Lemle Bosnak's bonus were approved by a majority vote of the Board.

their own self interest (*see, Marx v Akers*, 88 NY2d 189 [1996]); *Park River Owners Corp. v Bangser Klein Rocca & Blum*, 269 AD2d 313 [1st Dep't 2000]), the Amended Complaint merely alleges facts regarding the director's compensation which might be subject to differing opinions by ordinary businesspersons as to the benefit received by 132 West 31st Street Realty Corp.

Plaintiff's claims regarding excessive compensation, including those contained in the first and second causes of action, must, therefore, be dismissed.

Defendants next argue that the third cause of action in which plaintiff asserts a derivative claim for alleged fraud must be dismissed on the grounds that: (i) plaintiff has failed to set forth the claim with the requisite degree of particularity (*see, CPLR § 3016[b]*); and (ii) plaintiff cannot make any showing that either he or the corporation on behalf of which the derivative claim was brought, detrimentally relied on any alleged misrepresentations.

Plaintiff contends that Florence Lemle, aided and abetted by the other defendants, lied about her purported inflation and falsification of plaintiff's loan accounts and stonewalled plaintiff in order to cover up her manipulation of the corporation's books and

records and to forestall litigation concerning her purported falsification of the corporation's financial accounts.

This branch of the motion is granted to the extent of dismissing plaintiff's third cause of action with leave to replead the derivative claim within 30 days with greater particularity.

The claim is, however, dismissed with prejudice to the extent it relates to events occurring more than six years prior to the commencement of this action.

Defendants next move to dismiss plaintiff's accounting claims (i.e., the fourth and fifth causes of action) for failure to state a cause of action.

In order to state a claim for an accounting, plaintiff must allege that he "made a demand on the [defendants] for an accounting, that the [defendants were] in possession of the books, records, profits, or other assets of the alleged joint venture [or, in this case, the corporation], and that [they] failed or refused to provide such an accounting (citations omitted)." *NAB Construction Corp. v New York City Paper Mill, Inc.*, 265 AD2d 312 (2nd Dep't 1999).

Defendants argue that plaintiff, who is a director of the corporation, has not and cannot allege that defendants have

exclusive access to the corporation's books and records, because plaintiff has been repeatedly offered the opportunity to inspect all the books and records at the corporation's offices.

Defendants renewed this offer on the record at the oral argument held on January 16, 2008. It is this Court's understanding that plaintiff was given access to the books in or about the first week of March 2008.

Accordingly, that portion of the motion seeking to dismiss the fourth and fifth causes of action are granted.

In the sixth cause of action, plaintiff seeks a preliminary and permanent injunction barring and prohibiting each of the individual defendants from taking any action to remove plaintiff as an officer or director of the corporation, or taking any action (including the appointment of additional directors to the Board) to dilute or reduce plaintiff's ownership interest in the corporation, his salary and other legitimate fees, distributions, loans and other benefits, or evicting plaintiff from his office in the building.

Defendants argue this claim must be dismissed because the Complaint does not allege that they threatened to take any of these actions.

While the Amended Complaint does allege, inter alia, that "the actions and statements by Douglas Lemle and other of the Defendants indicate that the Individual Defendants have conspired to formulate a fraudulent scheme to remove Michael Lemle from the Corporation as a shareholder, director and officer;" it does not set forth any specific facts relating to the alleged fraudulent scheme.

Accordingly, this portion of defendants' motion is granted to the extent of dismissing the sixth cause of action with leave to replead with greater particularity.

Defendants next argue that plaintiff's seventh cause of action seeking common law dissolution of the corporation¹² should be dismissed on the ground that the Complaint fails to allege any legal basis for dissolving the corporation, which is a profitable entity providing significant economic benefits to all of its shareholders.

There "exists a common-law right to dissolution where management breaches its fiduciary duty to its shareholders (citations omitted). Yet, the conduct must be deemed 'egregious' (citation omitted)." *Matter of Quail Aeros Service, Inc.*, 300 AD2d

¹² Plaintiff does not and cannot seek statutory dissolution of the corporation, since that remedy is available only to "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation". BCL § 1004-a.

800, 802 (3rd Dep't 2002). See also, *Kruger v Gerth*, 22 AD2d 916, 917 (2nd Dep't 1964), *aff'd*, 16 NY2d 802 (1965), which held that "[d]issolution will not be compelled unless it be found that the dominant stockholders or directors have been 'looting' the corporation's assets and impairing the corporation's capital or maintaining the corporation for their own special benefit, thereby enriching themselves at the expense of the minority stockholders,..."

Defendants also argue that plaintiff cannot make this showing because they are not the majority shareholders of the corporation. In addition, defendants argue that plaintiff cannot demonstrate that they maintained the corporation simply to enrich themselves, since their mother has received the lion's share of benefits from the corporation. Moreover, defendants argue that plaintiff cannot make the required showing of an egregious breach of fiduciary duty, since the corporation has remained profitable and has been able to pay generous distributions to all its shareholders, including plaintiff, every year since 1999.

Plaintiff acknowledges that his siblings are not majority shareholders of the corporation, but argues that they can collectively outvote him. Plaintiff further contends that the individual defendants have in effect misappropriated substantial

amounts of money from Edna Lemle to enrich themselves at her expense.

Edna Lemle, however, is not a minority stockholder of the corporation. Thus, this Court finds that plaintiff has not alleged a common law right to dissolution of the corporation. Plaintiff's seventh cause of action must, therefore, be dismissed.

Defendants also argue that the eighth cause of action for the appointment of a temporary receiver should be dismissed because plaintiff has not alleged that "there is danger that the property will be removed from the state, or lost, materially injured or destroyed", as required pursuant to CPLR § 6401(a).

It is well settled that "[i]n the absence of clear proof of the danger of irreparable loss or damage, and proof that a receiver is necessary for the protection of the parties to the action, and their interests, a temporary receiver should not be appointed (citations omitted)." *Groh v. Halloran*, 86 A.D.2d 30, 33 (1st Dep't 1982)

Moreover, "[t]he appointment of a receiver is not a form of ultimate relief that can be awarded in a plenary action, but rather, is limited as a provisional remedy (see CPLR 6401[a]) or as an aid in post-judgment enforcement (see CPLR 5228)." *Old Republic Natl.*

Title Ins. Co. v. Cardinal Abstract Corp., 14 A.D.3d 678, 680-681 (2nd Dep't 2005).

Accordingly, those portions of defendants' motions seeking to dismiss the eighth cause of action are granted.

Plaintiff may file a Second Amended Complaint repleading the third and sixth causes of action in accordance with this Decision within 30 days of entry of this order.

Defendants shall serve Answers or otherwise move with respect to the Second Amended Complaint within 20 days of service thereof.

Finally, plaintiff's motion, under motion sequence number 003, for a preliminary injunction prohibiting the individual defendants from utilizing any of the funds or assets of the corporation and related relief must be denied, and the cross-motion by the individual defendants, to permit the corporation to advance their litigation expenses, granted.

BCL § 724(c) provides as follows:


Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.

The individual defendants have been sued herein as a result of actions allegedly taken as officers and directors of the corporation.

Having dismissed plaintiff's action, as currently pleaded, in its entirety, this Court finds that the individual defendants have clearly raised genuine issues of fact and law and are thus entitled to indemnification by the corporation of their reasonable expenses, including attorneys' fees, during the pendency of this litigation. Plaintiff's rights to contest the reasonableness of these fees are preserved and reserved to the end of the case, and the action, if repleaded, shall remain in IA Part 12.

This constitutes the decision and order of this Court.

Dated: January 9, 2009



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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