

**Binky Inc. v Korff**

2010 NY Slip Op 30112(U)

January 12, 2010

Supreme Court, New York County

Docket Number: 110247/06

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

BINKY INC. and DOTPOINTPERIOD, INC.,  
Plaintiff,

Index No.: 110247/06

Motion Date: 10/06/09

- v -

Motion Seq. No.: 04

STEVEN ANTHONY KORFF and MARCIA VAN WAGNER,  
Defendant.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1, 2	_____
3, 4	_____
5 - 7	_____

**FILED**

JAN 21 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers,

Defendant Steven Anthony Korff (Korff) moves for an order dismissing the claims of plaintiff Binky Inc. (Binky) pursuant to CPLR 3211, and/or for an order dismissing plaintiffs' claims in their entirety pursuant to CPLR 3212 and granting Korff summary judgment on his first counterclaim seeking judicial dissolution of Binky pursuant to sections 1104 and/or 1104-a of the Business Corporation Law (BCL). The claims against defendant Marcia Van Wagner, Korff's wife, were dismissed with prejudice by stipulation dated March 25, 2009.

Korff and non-party John Gray Philips (Philips) in 1996

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

formed Binky, a company that promotes records to radio stations. They were each 50% shareholders. Korff alleges that he and Philips orally agreed that as equal owners of Binky they would receive the same salary and bonuses from the proceeds of Binky and would be entitled to an equal share of the proceeds. Over time, the relationship between Korff and Philips became strained. Philips subsequently created plaintiff Dotpointperiod, Inc. (Dotpointperiod), a music management company, that was solely owned by Philips and operated out of Binky's corporate office. Korff further alleges that, Philips demanded that Korff provide services to Dotpointperiod without remuneration although Philips had no authority to do so. Korff states that he provided services to Dotpointperiod although he was under no obligation to do so.

Binky underwent a severe economic situation. In early March 2006 Philips expelled Korff from Binky's corporate offices and from all the managerial and financial aspects of the company claiming that Korff was not doing his job properly. Philips, in his affidavit submitted in opposition to the motion on behalf of plaintiffs, asserts that after he fired Korff he discovered that Korff had converted proceeds of Binky for his own personal use. Korff counters that Philips had been receiving health insurance benefits from Binky in which Korff had not shared. Korff avers that they had agreed at the inception of Binky that Korff was due

additional disbursements from Binky and that Korff was permitted to do whatever it took to "equalize" their compensation. Philips disputes this agreement. He states that during the time of his employment, Korff's health insurance was covered by various employers of his wife.

Binky and Dotpointperiod bring this action against Korff, claiming conversion of corporate property, misappropriation of corporate funds and damage to business reputation, and seeking damages, including punitive damages, and an accounting. In his answer, Korff includes counterclaims seeking a judicial dissolution of Binky and payment for services rendered to Dotpointperiod.

Korff moves to dismiss the action brought by Binky. He argues that under New York law, Binky has failed to properly state a cause of action. Korff and Philips are both 50% shareholders of Binky. Korff contends that where there are only two shareholders each with a 50% share, an action cannot be maintained in the name of the corporation by one shareholder against another with an equal interest and degree of control over corporate affairs. He claims that the proper action is a shareholder's derivative suit. Thus, Korff states that the suit in its current form must be dismissed.

Alternatively, Korff seeks summary judgment dismissing the complaint. He states that the first cause of action, that Korff

converted corporate proceeds and conducted his own business from Binky's corporate office, is legally and factually deficient. He asserts that he and Philips had an oral agreement to split the proceeds of Binky evenly. Moreover, he states that he cannot convert property that he claims to be his.

Korff claims that the second cause of action, which seeks an accounting of the personal property that Korff bought with corporate proceeds, should be dismissed because he did not convert the proceeds, and because the measure of damages to which a conversion plaintiff is entitled is the value of the property at the time and place of the conversion. According to Korff, plaintiffs would not be entitled to any increase in the value of the goods allegedly purchased with those proceeds.

Korff argues that the third cause of action, a claim for damages to the business reputation of Dotpointperiod, should be dismissed because Dotpointperiod has not been harmed, and that the claim is not an independent cause of action but an item of special damages that plaintiffs cannot prove. Korff seeks the dismissal of the demand for punitive damages because plaintiffs have not shown immoral conduct.

Korff also seeks summary judgment on his first counterclaim, the judicial dissolution of Binky. Korff seeks dissolution under BCL 1104 (a) (3) which provides for such relief where "there is internal dissension and two or more factions of shareholders are

so divided that dissolution would be beneficial to the shareholders." He also seeks dissolution under BCL 1104-a, which may be invoked where there are allegations that those in control of the corporation have been guilty of oppressive acts to those shareholders holding more than 20% of the outstanding shares, or that such persons have wasted corporate assets.

In opposition, plaintiffs contend that summary dismissal must be denied because there is a material issue of fact as to whether Korff properly took corporate proceeds. Plaintiffs argue that Korff improperly wrote corporate checks to third parties and made credit card charges for personal items. They dispute the claim that Korff was permitted to take the proceeds in order to equalize his compensation. Plaintiffs further argue that a corporation may bring an action against its officers and directors for the misappropriation of corporate funds.

It has been held that where there are only two shareholders, each holding a 50% stock interest in the corporation, an action cannot be maintained by one stockholder against another with an equal stock interest. See Sports Legends Inc. v Carberry, 61 AD3d 449 (1<sup>st</sup> Dept 2009); Executive Leasing Co. Inc. v Leder, 191 AD2d 199 (1<sup>st</sup> Dept 1993). As stated by the Court

By authorizing two shareholders constituting the owners of all shares of a corporation to serve as its only directors (Business Corporation Law § 702 [a]), the Legislature has implicitly recognized the desire for equal control in some closely held corporations, and to permit a deadlock to be remedied by an exercise of

presidential power disregards fundamental rules of agency law. For that reason, the courts have held that where there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs; the proper remedy is a stockholder's derivative action.

Stone v Frederick, 245 AD2d 742, 744 -745 (3d Dept 1997)

(citations and internal quotations omitted). Here, Korff and Philips are directors and 50 % shareholders of Binky and therefore the proper procedural vehicle to resolve their dispute is a shareholder's derivative suit. Executive Leasing Co. Inc. v Leder, at 200.

Therefore, the claims asserted by here by Binky shall be dismissed without prejudice as the proper remedy is for non-party Philips to commence a derivative suit against Korff on Binky's behalf. See Saunders v AOL Time Warner, Inc., 18 AD3d 216, 217 (1<sup>st</sup> Dept 2005.) In light of the conflicting factual claims it is premature for the court to consider a judicial dissolution of Binky at this time as requested by defendant.

Dotpointperiod is the remaining plaintiff in this action. Korff does not argue that the claim raised by Dotpointperiod, that Korff misappropriated funds from Dotpointperiod for personal use, should be dismissed and therefore the claim shall be sustained.

The complaint also seeks an accounting of artwork, antiques and other property allegedly purchased by Korff as well as

property allegedly purchased and sold by Korff. Plaintiffs seek the current and correct value of property allegedly purchased by Korff and the profits Korff derived from the sale of property. In the absence of a confidential or fiduciary relationship with defendant Dotpointperiod does not have a cause of action for an accounting. Reichert v N. MacFarland Builders, Inc., 85 AD2d 767, 768 (3d Dept 1981) ("cause of action was also properly dismissed since a cause of action for an accounting must allege a fiduciary relationship"). Therefore the court shall dismiss the second cause of action seeking an accounting.

The third cause of action alleges that the business reputation of Dotpointperiod was harmed due to transactions that Korff was involved in, in his personal capacity, on the Ebay website. In his motion papers, Korff stated correctly that "loss of business and damage to business reputation are not independent causes of action but, rather, they are items of special damages." M.D.T. 1984 Duplications Ltd. v Mark IV Industries, Inc., 283 AD2d 1001, 1002 (4th Dept 2001). Here, Dotpointperiod has not pleaded special damages in the complaint. The court shall therefore dismiss the third cause of action.

The court will also dismiss the punitive damages claim. The complaint seeks punitive damages against Korff because of his alleged fraudulent actions and the breach of his fiduciary obligations to plaintiffs. Punitive damages, in contrast to

compensatory damages, are awarded to punish a defendant for wanton and reckless or malicious acts and to protect society against similar acts. Rivera v City of New York, 40 AD3d 334, 344 (1<sup>st</sup> Dept 2007). To impose punitive damages, the law requires intentional or deliberate wrongdoing, aggravating or outrageous circumstances, fraudulent or evil motive, or conscious acts in willful or wanton disregard of another's rights. Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edleman & Dicker, 56 AD3d 1, 13 (1<sup>st</sup> Dept 2008). The facts here do not support such extraordinary relief.

Accordingly, it is

ORDERED that defendant Korff's motion to dismiss the claims of plaintiff Binky is GRANTED without prejudice to the commencement of a shareholder's derivative action; and it is further

ORDERED that defendant Korff's motion for summary judgment dismissing plaintiffs' claims is GRANTED to the extent that the second and third causes of action brought by plaintiff Dotpointperiod are DISMISSED and that the claim for punitive damages is DISMISSED; and it is further

ORDERED that defendant Korff's motion for summary judgment is otherwise DENIED; and it is further

ORDERED that defendant Korff's motion for summary judgment on the first counterclaim is DENIED; and it is further

ORDERED that the parties shall appear for a pre-trial conference on February 18, 2010 in Part 59, Room 1254, 111 Centre Street at 2:30 pm to set a trial date.

This is the decision and order of the court.

Dated: January 12, 2010

ENTER:

~~James J. ...~~  
**JAMES** J.S.C.

**FILED**  
JAN 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE