SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

STEVEN FREIFELD, EDWARD EVANGELISTA, THOMAS TUCKER, JOSEPH CARRIZZO, DONALD VIERING, PETER & CINDY JACOB AB TRUST, ANTHONY AYOUB, NANCY HAMENT, HAROLD WELLS, JOHN SCANLAN, RICHARD SCANLAN, ROBERT GARRY, ROBB THOMSON, MICHAEL KRUMMENACKER, JUDY GREENOUGH, PAUL WILIAMS, ROBERT CAGNINA, JOHN OLLQUIST, TED & KATHY KOBISHYN, JAMES ROPER, HOWARD PATRON, WILLIAM T. BOYD, JR. and MATRIX STRATEGIC PARTNERS, LLC,

Plaintiffs,

-against-

NATIVE AMERICAN ENERGY GROUP, INC. (DELAWARE), NATIVE AMERICAN GROUP, INC. (NEVADA), THE NATIVE AMERICAN ENERGY GROUP, CORP., NAEG FOUNDERS HOLDING CORPORATION,
(All such corporate entities referred to collectively as the "Companies")
KEITH C. BARON, JOSEPH D'ARRIGO and RAJ S. NANVAAN,

Defendants.

INDEX No. 005503/10

MOTION DATE: July 7, 2010
Motion Sequence # 001, 002

FREIFELD, et al **Index no. 005503/10**

The following papers read on this motion:

Order to Show Cause..... XX
Affirmation in Opposition..... X
Reply Memorandum of Law..... X

Motion by plaintiffs for an order compelling a meeting of shareholders is **denied**. Motion by plaintiffs for an order allowing inspection of the books and records is **granted** to the extent indicated below. Motion by plaintiffs for an order requiring defendants Joseph D'Arrigo and Raj Nanvaan to account to the shareholders at the shareholders meeting is **denied** without prejudice. Motion by defendant Native American Energy Group to transfer the action to New York County is **denied**.

This is an action for fraud and breach of fiduciary duty. Plaintiffs are investors in defendant Native American Energy Group, Inc or one of its affiliated corporations. The companies purport to be involved in the development of oil and natural gas reserves on Indian reservations. Defendant Joseph D'Arrigo is the president of Native American Energy. Defendant Raj Nanvaan is the secretary treasurer of the corporation. Defendant Keith Baron is a securities broker who solicited certain of the plaintiffs to invest in the companies.

Plaintiffs allege that no meetings of the shareholders have been held, and they have not been issued stock certificates. Plaintiffs further allege that no distributions have been made, and defendants have failed to account to plaintiffs for their investments. Finally, plaintiffs allege that defendants have looted the corporate assets and diverted corporate opportunities to defendant Native American Energy Group of Delaware, the other Native American Energy Group being a Nevada corporation.

This action was commenced on March 19, 2010. Plaintiffs allege that the individual defendants are alter egos of the companies and also assert claims for fraud and breach of fiduciary duty. In their complaint, plaintiffs request access to the books and records of North American Energy Group Founders Holding Corporation ("NAEG Founders Holding"), which is allegedly the parent of the other companies and a New York corporation. Plaintiffs request disclosure of the "security and value" of the security which plaintiffs should have received in exchange for their respective investments. Plaintiffs request disclosure of the shareholders list. Plaintiffs request the holding of a shareholders meeting, termination of the current officers and directors, and the election of a new board. Finally, plaintiffs request damages in the amount of their investments and punitive damages.

Plaintiffs move for an order pursuant to Business Corporation Law § 602 directing a shareholders meeting with respect to NAEG Founders Holding. Plaintiffs move for an order pursuant to Business Corporation Law § 624 granting them the right to inspect the books and records of NAEG Founders Holding. Finally, plaintiffs move for an order directing defendants D'Arrigo and Nanvaan to account to the shareholders at the meeting.

Defendant Native American Energy Group, Inc moves to change venue to New York County and to stay proceedings pending the transfer. On April 22, 2010, defendants served a demand on plaintiffs pursuant to CPLR § 511 to transfer venue to New York on the ground that Nassau was not a proper county. Defendants rely upon a "memorandum of understanding" signed by plaintiffs Freifeld, Evangelista, and Carizzo and by D'Arrigo on behalf of NAEG Founders Holding on April 3, 2006. The memoranda of understanding provide that a number of shares in NAEG Founders Holding would be issued to each of the plaintiffs within two weeks of the date of the agreement. The memoranda further provide that the company would pay a royalty to the shareholder based upon a percentage of "the total gross payment received by Company from NAEG on the oil produced and sold...on a quarterly basis." The memoranda provide that the "venue for any dispute in reference hereto shall be submitted to the courts in New York, New York." In opposition to the motion, plaintiffs argue that because NAEG Founders Holding never issued the stock, the memorandum of understanding, including the forum selection clause, is void for lack of consideration.

CPLR § 501 provides that subject to the provisions of § 501(2) [changing venue on the ground that an impartial trial cannot be had in the proper county], a written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial. A contractual forum selection clause providing that trial shall be in a particular state is prima facie valid and enforceable unless it is shown to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that trial in the selected forum would be so gravely difficult that the challenging party would be deprived of its day in court (***Bernstein v Wysoki***, 2010 N.Y. App. Div. LEXIS 6579 [2d Dept 2010]). Thus, a state forum selection clause will control, absent a strong showing that it should be set aside (Id). It is not clear that clauses providing that trial shall be in a particular county within New York are entitled to the same deference.

It has been held that where a party disaffirms an agreement, he is not bound by the forum selection clause (***U.S. Fid. & Guar v Ragusa***, 195 AD2d 313 [1st Dept 1993]). Thus, where a party claims that an agreement is permeated with fraud, and void from the beginning,

the forum selection clause is unenforceable (***DeSola Group v Coors Brewing***, 199 AD2d 141 [1st Dept 1993]). However, where a forum selection clause requires trial in a foreign country, a party resisting enforcement of the clause may be required to allege fraud "with respect to the jurisdictional provision itself"(***British West Indies Guaranty Trust v Banque Internationale***, 172 AD2d 234 [1st Dept 1991]).

Plaintiffs' request for an order directing a stockholders meeting suggests that they are affirming the memoranda of understanding, which are in essence subscription agreements. However, plaintiffs' request for damages in the amount of their investments suggests that they seek to rescind their investor agreements. Plaintiffs' characterization of Native American Energy Group as a "corporate shell game and a matter of theft by means of deceit and fraud" buttresses this conclusion. Reading the complaint as a whole, the court determines that plaintiffs are seeking to rescind their investment contracts for fraud. Accordingly, plaintiffs are not bound by the forum selection clauses in the memoranda of understanding. Defendants' motion to change venue to New York County on the ground that Nassau is not a proper county is **denied**.

Business Corporation Law § 602(b) provides that a meeting of the shareholders shall be held annually for the election of directors and the transaction of other business on a date fixed by or under the by-laws. However, absent deadlock among the directors or shareholders, failure to hold the annual meeting on the date so fixed shall not work a forfeiture or give cause for dissolution of the corporation (Business Corporation Law § 602[b]). Section 602 does not expressly authorize the court to order a meeting of stockholders where an annual meeting has not been held as required by the statute. Nevertheless, it is clear that the court has the power to order a stockholders meeting (***Ocilla Industries, Inc v Katz***, 677 F. Supp. 1291, 1301-02 [EDNY 1987]).

However, in view of plaintiffs' allegations that Native American Energy Group is a corporate shell game, it is not clear what purpose would be served by ordering a shareholders meeting. In their third item of relief, plaintiffs request that defendants D'Arrigo and Nanvaan be directed to account to plaintiffs for their interest in the company at the meeting. Were this a derivative action brought on behalf of Native American Group, the individual defendants could be required to account to the corporation. However, it seems neither appropriate nor practical for the directors to render an accounting at a shareholder meeting. Plaintiffs' motion for an order directing a meeting of the shareholders of NAEG Founders Holding Corporation is **denied**. Plaintiffs' motion for an order requiring defendants D'Arrigo and Nanvaan to render an accounting at the shareholders meeting is **denied** without

prejudice to plaintiffs' seeking appropriate relief at the conclusion of discovery.

Business Corporation Law § 624(e) provides that upon written request of any shareholder, the corporation shall give or mail to such shareholder an annual balance sheet and profit and loss statement for the preceding fiscal year. If any interim balance sheet or profit and loss statement has been distributed to its shareholders or otherwise made available to the public, the most recent of these documents shall also be given or mailed to the shareholder (Bus Corp Law § 624[e]). The statute further provides that "Nothing herein contained shall impair the power of courts to compel the production for examination of the books and records of a corporation" (Bus Corp Law § 624[f]).

Since plaintiffs are seeking discovery broader than a balance sheet or profit and loss statement, they are invoking a common law remedy. In such a common law proceeding, the burden of proof is on the shareholder to establish that the inspection of the corporation's books and records is for a proper purpose (***In re Marcato***, 102 AD2d 826 [2d Dept 1984]). In view of defendants' failure to account to plaintiffs for their investment, or even issue stock certificates, the court concludes that plaintiffs' request is for a proper purpose. While the application should been brought as an article 78 proceeding, the court converts this action into an article 78 for the purpose of the present motion. Plaintiffs' application for inspection of the books and records of NAEG Founders Holding Corp is **granted**. The inspection shall take place at the office of the corporation, 1018 Queens Blvd, Forest Hills, New York at 10:00 am on September 29, 2010 , at such place as may be agreed to by counsel. Any adjournment of this matter shall required consent of the Court.

So ordered.

Dated 13 September 2010

Stephen A. Bucaria
J.S.C.

ENTERED
SEP 15 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE