

Lemle v Lemle

2010 NY Slip Op 34007(U)

July 9, 2010

Supreme Court, New York County

Docket Number: 601281/07

Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK

PART 39

Justice

Lemle, Michael

INDEX NO. 601281/07

- v -

MOTION DATE _____

Lemle, Florence

MOTION SEQ. NO. 004

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

RECEIVED

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MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 7/9/10

[Signature]
BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

-----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,

-against-

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

Defendants.

-----x

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Motions Seq. Nos.
004 and 006

Motions sequence numbers 004 and 006 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 the corporation,
seeks to compel the individual defendants, Florence Lemle, Douglas
Lemle and Deanne Lemle Bosnak (plaintiff's siblings), to account
for, and repay to the corporation several million dollars in
corporate assets which they, as controlling members of the
corporation's Board of Directors, allegedly misappropriated or
otherwise converted in breach of their fiduciary duties for their
own personal benefit.

The Verified Complaint and First Amended Complaint contained claims for the following causes of action: (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 (the "building") (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) the immediate appointment of a temporary receiver to administer the corporation's affairs and to collect its assets pending the dissolution of the corporation (eighth cause of action).

By Decision/Order dated January 9, 2009, this Court: (i) dismissed the first and second causes of action, that portion of the third cause of action which relates to events occurring more than six years prior to the commencement of the action, the fourth and fifth causes of action, and the seventh and eighth causes of action; (ii) dismissed the non time-barred derivative claim contained in the third cause of action with leave to replead with greater specificity; and (iii) dismissed the sixth cause of action with leave to replead with greater specificity.

Plaintiff subsequently filed a Verified Second Amended Complaint, setting forth claims for: (i) fraud ("first claim"; formerly, the third cause of action); and (ii) a preliminary and permanent injunction barring and prohibiting 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 to evict plaintiff from his office in the building ("second claim"; formerly, the sixth cause of action).

Plaintiff now moves, under motion sequence number 004, for an order pursuant to CPLR § 2221(d) and (e) granting leave to renew

and/or reargue this Court's prior Decision/Order on the ground that this Court overlooked or misapprehended matters of fact and law, and based on new facts which plaintiff contends were not previously available.

The individual defendants oppose the motion and jointly move, under motion sequence number 006, for an order pursuant to CPLR §§ 3211(a)(2), (5) and (7) and 3024(b), (i) striking paragraphs 1, 2, 15, 16, 20-61, 63, 64, 72-74, 91-99; 106, 107, 109, 112 and 114-116 of the Second Amended Complaint relating to causes of action previously dismissed with prejudice; and (ii) dismissing the remainder of the Second Amended Complaint, and all claims and causes of action therein, with prejudice.

Based on the papers submitted and the oral argument held on the record on December 3, 2009 and April 7, 2010, plaintiff's motion for renewal and/or reargument of this Court's January 9, 2009 Decision/Order is granted only to the extent of granting reargument of that portion of this Court's Decision/Order which dismissed 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 Constr. Corp. V New York City Paper Mill, Inc.*, 265 AD2d 312 (2nd Dep’t 1999).

Defendants argued on the prior motion that plaintiff had not, and could not, allege that defendants had exclusive access to the corporation’s books and records, because plaintiff had been repeatedly offered the opportunity to inspect all the books and records at the corporation’s offices, an offer that was renewed on the record at the oral argument held on January 16, 2008. It was further this Court’s understanding that plaintiff was given access to the books in or about the first week of March 2008.

However, plaintiff claims that he was denied access to additional records and workpapers in the possession of the corporation’s accountants which would be required for the outside accounting firm, Perelson Weiner LLP, which was hired by plaintiff, to conduct a full forensic accounting or audit to determine the accuracy and validity of the corporation’s official books and records, including the accounts of loans extended by the

corporation to the parties. Moreover, defendants concede that the amounts set forth in the loan accounts are not accurate.

Accordingly, upon reargument, that portion of defendants' prior motion seeking to dismiss the fourth and fifth causes of action is denied.

Defendants argue that plaintiff's re-pleaded fraud claim, in which plaintiff alleges that the accounts are inaccurately recorded on the corporation's books, must be dismissed because plaintiff has failed to allege that: (a) any misrepresentations were made to the corporation; (ii) any defendant acted with *scienter*; or (iii) the corporation reasonably relied on the alleged misrepresentations to its detriment.

This branch of the motion is denied as premature, since it appears to be dependent on the outcome of the accounting directed above. That portion of the motion seeking to strike specific paragraphs from the Second Amended Complaint is likewise denied as premature.

Finally, defendants argue that plaintiff's second claim for injunctive relief must be dismissed on the grounds that: (a) plaintiff has not alleged any facts showing that defendants intend

to vote him off the Board, replace him as an officer, and/or charge him rent for his office space; and (b) plaintiff has no personal rights regarding the number or identity of the other directors on the board.

The Second Amended Complaint alleges that "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." (§ 113). Plaintiff further claims in opposition to the defendants' motion to dismiss that the defendants have 'moved' to remove him from his position as an officer of the corporation and to deprive him of his equal benefits, including health insurance, contrary to the expressed directive of his mother, Edna Lemle, the largest single shareholder of the corporation.

However, the number of directors remains the same. The new director, Larka Bosnak (the daughter of defendant Deanne Lemle Bosnak), was elected, without objection, at the 2008 annual meeting to replace the parties' elderly mother who plaintiff agreed was no longer competent to serve as a director of the corporation, and was re-elected with plaintiff's affirmative vote at the 2009 annual meeting.

Moreover, plaintiff has not alleged any specific actions which defendants have actually taken to affect his status within the corporation. Moreover, it is undisputed that plaintiff remains a director of the corporation and continues to receive health insurance benefits.

Accordingly, the second claim of the Second Amended Complaint is dismissed for failure to state a cause of action.

Defendants shall serve an Answer to plaintiff's claims for an accounting and for fraud within 30 days of entry of this order.

A preliminary conference shall be held in IA Part 39, 60 Centre Street, Room 208 on September 22, 2010 at 10:00 a.m.

This constitutes the decision and order of this Court.

Date: July 9, 2010



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.