

Teplitsky v Karian

2011 NY Slip Op 30344(U)

January 31, 2011

Sup Ct, Nassau County

Docket Number: 014840/2010

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL TERM PART 7

**IDA TEPLITSKY, both individually and on behalf
of the shareholders of PHYSICIANS CHOICE, INC.,**

Plaintiff,

**INDEX NO.: 014840/2010
MOTION DATE: 1/19/11
SEQUENCE NO.: 02**

- against -

STEPHAN KARIAN and LORI KARIAN,

Defendants

Application of IDA TEPLITSKY

Petitioner.

**INDEX NO.: 014841/2010
MOTION DATE: 11/5/10
SEQUENCE NO.: 01**

**For the Judicial Dissolution of
PHYSICIAN'S CHOICE, INC.,**

PHYSICIAN'S CHOICE, INC.

STEPHAN KARIAN, and

Plaintiffs

**INDEX NO.: 016539/2010
MOTION DATE: 1/19/11
SEQUENCE NO.: 02**

- against -

IDA TEPLITSKY and MICHAEL TEPLITSKY

Defendants

The following documents were read on these motions: Index No.

014840/2010

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 Memorandum of Law in Support of Motion to Dismiss 3
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Index No. 016539/2010

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PRELIMINARY STATEMENT

In the first-filed motion Defendants Stephan Karian and Lori Karian move to dismiss the Complaint of Ida Teplisky, individually and on behalf of Physician's Choice, Inc. ("PC").

In the second above-captioned action, an action to dissolve the corporation, Ida Teplisky seeks an injunction to preventing PC and its directors and officers from exercising corporate powers without permission of the Court; restraining PC and its officers and directors from collecting or receiving any debt of the corporation, or paying out or transferring any property of the corporation without permission of the Court; and restraining Creditors of PC from commencing an action against the corporation, or taking action in any proceeding heretofore commenced, except by permission of the Court; and for the appointment of a Receiver.

The motion in the third cause of action is on behalf of the Teplitskys for dismissal of the complaint of Stephan Karian and PC. Plaintiff Karian responds that the motion should be dismissed because they have amended the complaint as of right which names Stephan Karian and Lori Karian as tenants by the entirety on behalf of PC and Stephan Karian individually. The reply on behalf of the Tepliskys is that the amendment adding causes of action and an additional plaintiff was not as of right, and, in any event, does not deal with the issues raised in the motion that the summons was never served with the original complaint, service of the amended summons with notice was never properly served, and that the amendments to the summonses, parties and claims were impermissible, and the summons failed to give defendant appropriate notice of the claims against them.

BACKGROUND

Dr. Michael Teplitsky and Stephan Karian are entrepreneurs in the medical health supplement field. In approximately 1996 they made one another's acquaintance and subsequently determined that they would join in a business which would sell such products. At that time Karian was the owner and operator of a company named Great American Products ("GAP"), through which he sold health supplements. Teplitsky was

selling a non-proprietary prostate health supplement to his patients, which they agreed to duplicate and market under the name "Super Prostate".

Each invested \$5,000 to become a 50% shareholder in PC. Teplitsky placed the shares in the name of his wife, Ida, while Karian took his shares to be held jointly with his wife, Lori. The company originally operated out of PC's offices at 170 W. 73 Street, New York, NY, Karian's home. In 1997 the company relocated to Destin, Florida, although it continued to maintain a location on W. 73rd Street.

Between 1996 and 2009 the Teplitskys were not actively engaged in the operation of PC. Karian served as the President and Chief Executive, while Ida served as Secretary/Treasurer and was a Director. According to Karian, she did not attend shareholder or board meetings, but signed approval of the minutes for those meetings during those years. Throughout this period she was a signatory on all PC bank accounts and received bank statements directly from the banks. For the most part, Karian's contact was with Michael Teplitsky as the party principally involved with the company.

Initially, the operations of PC were incorporated into the GAP operations, but in about 2000 separate entities were formed to provide services for fulfilling orders, procurement and management. These entities were Direct Response Marketing, Inc. ("DR Marketing"), Customer Care, Inc. ("CCI"), and Destin Realty, Inc. ("Destin") were formed, owned and managed by Karian. Neither Karian or his wife receive salaries from any of these three entities, their purpose is to facilitate the operation of PC. DR Marketing receives cash from PC at the beginning of its fiscal year, which coincides with the end of PC's fiscal year. They operate on a running account from year to year.

Between 1996 and 2009 the Board of Directors of PC has made shareholder distributions to the Teplitskys of \$6,485,000 in the form of corporate dividends. The Karians have jointly received \$5,601,412.48 as corporate dividends, having deferred \$883,588. The figure is not agreed upon by Teplitsky. Since 2005, because of a significant reduction in sales, the company has not made distributions. The gross sales

for 2003 were \$32,964,317, but were down to \$2,800,000 as of 2009. Teplitsky claims that the reduction in sales is in large measure due to the performance of Karian.

In 2003 Karian asserts that the parties agreed that he would receive an annual salary or \$1,000,000, which was approved by Ida Teplitsky as a board member for each year between 2003 and 2006. He claims that between 2003 and 2010 he has deferred more than one-half of his salary, having received \$3,607,054 of the \$8,000,000 to which he was entitled for those years. Allegedly, at the May 2010 Board of Directors' Meeting, Michael Teplitsky agreed that he was entitled to payment of deferred income, but was not in agreement on any particular amount.

In late 2003 and early 2004 the Federal Trade Commission ("FTC") commenced action against PC, GAP, Karian and Michael Teplitsky based upon advertising and endorsements by PC and GAP from 2001 through August 2004. In May 2005 all defendants signed a stipulated order and agreement by which they committed to make certain changes in their advertising and to support a product redress program of up to \$20,000,000. The matter was ultimately resolved by the payment to the FTC of \$12,001,931.99 by GAP and \$5,104,194.98 by PC. The parties were relieved of their personal guarantees by virtue of the settlement. No issue was ever raised as to the propriety of the settlement in any meetings of the Board of Directors or Shareholders.

Beginning in May 2009 Michael Teplitsky requested to see PC's financial records, which were allegedly provided to him with a copy of PC's QuickBooks accounting records in mid-2009. The Teplitskys traveled to Destin for a meeting in December, prior to which they requested that certain information be provided them at that time. In preparation for the meeting, according to the affidavits of Karian and Liz Bryant, the bookkeeper, a weekend was devoted to the accumulation of 13 years of financial records for PC. According to Ms. Bryant, the Teplitskys barely paid attention to the records, and left without taking their copies.

According to Karian, Ida Teplitsky revealed to him on the day of the meeting that they were experiencing economic difficulties, and owed significant back taxes. As a result, the Board of

Directors agreed to make a disbursement of \$144,000 to Ida Teplitsky, based on a consideration of the amount of deferred dividends and compensation owed Karian.

In May 2010 Michael Teplitsky expressed his opinion that the diminished success of PC was because of marketing failures, although not on account of wrongdoing by Karian. He sought to become more involved in an effort to increase the income. He requested that he be hired as a salaried marketing executive, that Karian buy his interest in the company, or, as a last alternative, that the matter be litigated.

Karian responds to petitioner's supplemental affirmation that all of the amounts which are challenged were accounted for as either salary of shareholder distributions; that payments to DR Marketing are paid annually in advance of purchases; and that some of the payments were for erroneously unpaid monthly rent to Destin Realty at the rate of \$10,000 per month.

DISCUSSION

Order to Show Cause for Injunction and Appointment of a Receiver - Index No. 014841

Injunctive Relief

"To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction." (*De Fabio v. Omnipoint Communications, et al.*, 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing CPLR 3201, *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988), *W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 (1981); *See also, Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 — 1073 (2d Dept. 2008).

"Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient". (*Walsh v. Design Concepts*, 221 A.D.2d 454, 455 (2d Dept. 1995). On the contrary, "(e)conomic loss, which is compensable by money damages, does not constitute irreparable harm". (*EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dept. 2007). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction

(Automated Waste Disposal at 1073).

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court's formidable equity power in cases where the moving party's position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia*, 54 A.D.2d 322, 326 [4th Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry. Thus, for example, where a pharmaceutical manufacturer of a non-prescription product was seeking to enforce an exclusivity agreement, and preliminarily enjoin defendant from importing and marketing the same product, the balance of equities favored defendant, since plaintiff could recover damages, while defendant would have to remove product from the shelves for an indeterminate length of time. (*OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348 [1st Dept. 2007]).

The allegations made by Teplitsky are insufficient to justify the relief requested. Aside from the fact that Karian has raised significant issues tending to justify the actions complained of, the allegations of wrongdoing are essentially all resolvable by payment of monetary damages, if they are proven. For example, the allegation has been made that Karian wrongfully diverted assets of PC to pay FTC ordered redress for customers of another Karian entity. In fact, however, the record, as it currently exists, reflects an FTC action against PC, GAP, Karian and Teplitsky. The resolution, involving payment of \$12,001,931.99 by GAP and \$5,104,194.98 was approved by the Board of Directors, of which Teplitsky is a member, and presumably reflected differing levels of liability.

The allegation that Karian drew millions of dollars in salary despite his representation that he would draw no salary until the company resumed its profitability is belied by the

specifics as to the amount agreed upon, the amount drawn, and the amount deferred, subject only to a final resolution as to the amount. In any event, if excessive or unwarranted salary was drawn, it is replaceable by financial damages. The same can be said for the claim that Karian wrongly converted assets by transferring them to other entities which he owns or controls. Karian states that the three entities which he owns, Direct Response Marketing, Customer Care, and Destin Realty, Inc., exist for the sole purpose of servicing PC, and have been doing so, without complaint, since 2000. Even if the allegations by Teplitsky were true, including that these entities were charging above-market rates to PC, the issues are fully resolvable by payment of money damages.

The claim that Karian has deprived Teplitsky of access to books and records is belied by affidavits of the bookkeeper and Karian as to the lengths to which they went to provide 13 years of business records, which they claim were essentially ignored, and not even taken by the Teplitskys on the occasion of their visits to Destin in December, 2009 and May, 2010, for the Board of Directors Meetings. Certainly, the commencement of an action by Karian in New York County, whether correctly or incorrectly initiated, is not a basis for injunctive relief.

Teplitsky's motion for injunctive relief is in all respects denied.

Karians' Motion to Dismiss the Teplitsky Complaint - Index No. 014840/2010

By Amended Notice of Motion dated December 20, 2010 the Karians moved to dismiss the Amended Verified Complaint dated October 18, 2010. (Exh. "1" to Mangan Affirmation in Support of Motion"). As a prelude to the seven causes of action, the complaint asserts that Ida Teplitsky called a Special Meeting of the Shareholders for July 15, 2010, that such notice was duly served, but that the Karians did not appear. It further asserts that beginning in or about 2005 the Karians used their control of PC and its assets to perpetrate a fraud on PC and the plaintiff. The causes of action are as follows;

FIRST: Breach of Fiduciary Duty, Self-dealing, Corporate Waste, and Conversion against Stephan Karian with respect to the payment by PC of a portion of the FTC penalty;

- SECOND: Breach of Fiduciary Duty, Self-dealing, Corporate Waste and Conversion against Stephan Karian on the basis that he received a salary of \$1,000,000 per year and engaged in a scheme to hide the payments by listing them as "Wages" on tax returns, rather than as "Officers Salaries";
- THIRD: Breach of Fiduciary Duty, Self-Dealing, Corporate Waste, Conversion and Unjust Enrichment against Stephan Karian and Lori Karian. Plaintiff alleges that certain withdrawals for and payments on behalf of the Karians were without authority. Plaintiff seeks \$15,000,000 in damages and \$7,000,000 in punitive damages.
- FOURTH: Breach of Fiduciary Duty, Self-Dealing and Corporate Waste against Stephan Karian and Lori Karian. Plaintiff alleges that Karians have paid exorbitant fees to entities which they control between 2005 and 2008, totaling \$8,458,000. The entities are the previously described Dr. Marketing, Inc., Customer Care, Inc. and Destin Realty Group.
- FIFTH: Declaratory Judgment and Injunctive Relief against Stephan Karian and Lori Karian. In this cause of action, plaintiff alleges that she has not received the tax returns for 2009, although acknowledging receipt of the returns and Quick Book records for 2005 — 2008, and seeks a declaratory judgment that she is entitled to the 2009 returns.
- SIXTH: Declaratory Judgment and Injunctive Relief against Stephan Karian. Plaintiff claims that, as the Secretary and Treasurer of PC, she is entitled to physical custody of the books and records of the corporation. Her demand for these records has not been complied with by defendant.
- SEVENTH: Declaratory Judgment and Injunctive Relief against Stephan Karian, calling for a declaration that the action brought by Karian in

Supreme Court, New York County, and the retention of counsel, was done without the authority of PC, and seeks a directive that Karian withdraw that action.

The Motion

The motion with respect to the first four causes of action is based upon the claim that the complaint fails to allege breach of fiduciary duty, and breach of trust with the degree of specificity required by CPLR § 3016 (b), which provides as follows:

(b) Fraud or mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

Causes of Action First Through Fourth are asserted as an amalgamation of three theories of liability. The motion to dismiss is based upon CPLR §§ 3211 and 3016 for failure to state a cause of action with the degree of specificity required.

On a motion to dismiss pursuant to CPLR § 3211 (a)(7), claiming that the complaint fails to state a cause of action, the court must determine, "accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated" (*Malik v. Beal*, 54 A.D.3d 910, 911 [2d Dept. 2008]); *Simmons v. Edelstein*, 32 A.D.3d 464, 465 [2d Dept. 2006]; *Manfro v. McGivney*, 11 A.D.3d 662, 663 [2d Dept. 2004]).

As a starting point, the mere fact that the parties were engaged in a business enterprise is insufficient to create the existence of a fiduciary relationship. (*Roni LLC v. Arfa, et al.*, 74 A.D.3d 442, 444 (1st Dept. 2010)). Plaintiff has not shown that defendant "had superior expertise or knowledge about some subject and misled [the] plaintiff by false representations concerning the subject". (*Stuart Silver Assoc. V. Baco Dev. Corp.*, 245 A.D.2d 96, 99 [1st Dept. 1997]). All claims based upon breach of a fiduciary duty are dismissed.

The First Causes of Action is based upon an alleged breach of fiduciary duty by

virtue of Karian's utilizing PC funds to pay redress penalties which were based upon products marketed by GAP, in which Teplitsky has no interest, and payment of an annual salary of \$1,000,000. Because these parties were not in a fiducial relationship, the First Cause of Action, as asserted, is without merit. The issue however, is whether it states a cause of action under any cognizable theory.

Actions against officers and directors of corporations for misconduct are governed by BCL § 720, which provides as follows:

§ 720. Action against directors and officers for misconduct

(a) An action may be brought against one or more directors or officers of a corporation to procure a judgment for the following relief:

(1) Subject to any provision of the certificate of incorporation authorized pursuant to paragraph (b) of section 402, to compel the defendant to account for his official conduct in the following cases:

1. The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.
2. The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.

(2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.

(3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there is sufficient evidence that it will be made.

(b) An action may be brought for the relief provided in this section and in paragraph (a) of section 719 (Liability of directors in certain cases) by a corporation, or a receiver, trustee in bankruptcy, officer, director or judgment creditor thereof, or, under section 626 (Shareholders' derivative action brought in the right of the corporation to

procure a judgment in its favor), by a shareholder, voting trust certificate holder, or the owner of a beneficial interest in shares thereof.

(c) This section shall not affect any liability otherwise imposed by law upon any director or officer.

Despite the language of the First Cause of Action, couched as it is in terms of a breach of fiduciary duty, it can be interpreted to allege a violation by Karian of his duties as an officer and director of the corporation in the management and disposition of corporate assets. For this reason, the motion to dismiss the First Cause of Action is denied.

The same is true for the Second — Fourth Causes of Action. Despite the headnotes above the language of these causes of action, the essence of them is that Karian, in violation of his duties as an officer and director, diverted corporate funds for unauthorized salary, unauthorized payments to, or on behalf of, Stephan and Lori Karian, and excessive payments to Dr. Marketing, Customer Care, Inc., and Dustin Realty Group, The Second — Fourth Causes of Action can fairly be interpreted to state causes of action against Stephan Karian.

The Third and Fourth Causes of Action allege wrongdoing by Lori Karian, who is neither a director nor an officer of the corporation. The Third and Fourth Causes of Action fail to state a cause of action against Lori Karian and are dismissed as against her.

The Fifth Cause of Action seeks a declaratory judgment that Ida Teplitsky is entitled to "any and all books and records of PC", along with the costs of the action. Section 5 of the By-Laws of PC sets forth the rights of shareholders to review books and records of the corporation. Subdivision (a) states as follows: -A shareholders (sic.) of this corporation is entitled to inspect and copy, during regular business hours at the corporations's principal office, the records of the corporation described in Article IV, Section 5 (e) of these bylaws if the shareholder gives the secretary written notice of the shareholder's demand at least five (5) business days before the date on which the shareholder wishes to inspect and copy. Subdivision (b) specifies the records which are available for inspection, and subdivision (c) imposes a good faith

and particularity requirement on the demand. The names and addresses of all shareholders is separately reviewable for a limited period under Art. II, Sec. 11 of the bylaws.

The Fifth Cause of Action for declaratory judgment, however, calls for a determination that Ida Teplitsky is entitled to the production of any and all books and records. This may well be determined in the course of discovery, but as a matter of entitlement to review the books and records, the by-laws do not require production at other than the principal place of business, in this case, Destin, Florida. Teplitsky is not entitled to the relief requested, a declaratory judgment that she is entitled to the production of books and records. To the extent that the cause of action can be reasonably interpreted to mean that she is entitled to review the books and records at the principal place of business of PC, it states a valid cause of action and the motion to dismiss it is denied.

In the Sixth Cause of Action, Teplitsky asserts that, as Treasurer, she is entitled to possession of the financial records and data of PC, relying on Article VI, Sec. 6 of the bylaws. There is no interpretation of this cause of action which states a cause of action.

The cited section provides that the Treasurer "shall keep and maintain, or cause to be kept and maintained, at the principal business offices of the corporation, adequate and correct books and records of the accounts of the income, expenses, assets, liabilities, properties and business transactions of the corporation". The plain meaning of this provision of the by-laws is that whether the Treasurer personally keeps the financial books and records, or arranges for them to be kept by another, they must be located at the principal place of business of the corporation.

The Sixth Cause of Action fails to state a cause of action and the motion to dismiss it is granted.

Teplitsky's Motion to Dismiss the Complaint of Stephan Karian and PC (016539/2010)

The Complaint

A copy of the Verified Complaint, originally venued in New York County, is annexed to the Motion to Dismiss under Nassau County Index No. 016539/2010. The complaint reiterates the history of the creation of PC, its profitability, the amount of distributions received by Teplitsky, and the events of December 2009, when Dr. and Mrs. Teplitsky traveled to the offices of PC to review the books and records. It also includes a statement that Ida Teplitsky abdicated her responsibilities as Treasurer, failed to attend a meeting of the Board of Directors until 2010, and relied on Karian to perform the duties of Secretary and Treasurer. It then goes on to assert the following three Causes of Action:

FIRST: Plaintiff Karian seeks dissolution of the corporation pursuant to B.C.L. § 1104, and for common law dissolution. Karian asserts that the Board of Directors are unanimously in agreement that there is a deadlock between the two directors, so as to impede and render impossible for the Corporation to continue doing business, and that it would be in the best interests of the shareholders.

SECOND: Plaintiff Karian asserts a breach of fiduciary duty against Ida Teplitsky in that she failed to take steps to ensure that the duties of Treasurer were performed, leaving them to be completed by other persons, without supervision. To the extent Ida Teplitsky claims that the directors and officers have acted to the detriment of the corporation, it is, in fact, her inaction which has caused any such damage to the corporation. In addition, Teplitsky has breached her fiduciary duty to the corporation by commencing a meritless, and, in fact, frivolous action in Nassau County, which serves to demean the reputation of the corporation.

THIRD: This cause of action alleges that Michael Teplitsky owes Karian and the corporation a fiduciary duty as the founder of the corporation and the de facto shareholder of the corporate shares assigned to Ida Teplitsky. By virtue of his disciplinary record as a

medical doctor, which he has allegedly failed to report to plaintiff and the corporation, he has caused damage to the corporation, resulting in diminished sales and distribution to shareholders. He has allegedly further acted in concert with Ida Teplitsky to commence a false and frivolous complaint against plaintiff.

The Motion

Counsel for Teplitskys claims that the First Cause of Action, for Dissolution of the corporation should be dismissed because there is a prior action pending between the parties requesting, in part, the same relief. The action entitled *Application of Ida Teplitsky for the Judicial Dissolution of Physician's Choice, Inc.*, Nassau Co. Index No. 014841/2010 was commenced on August 4, 2010, while the action in New York County was only commenced on September 9, 2010. While Karian previously filed a Summons with Notice, that does not constitute a prior pending action. Additionally, BCL § 1104 provides for the filing of a petition, as opposed to a complaint, for the dissolution of a corporation

The Second Cause of Action for Breach of Fiduciary Duty against Ida Teplitsky must be dismissed for failure to state a cause of action. The alleged breaches include abdication of her obligations as Treasurer, and bringing an action against the Karians. The motion claims that while Karian alleges that Teplitsky abdicated her duties, he also alleges that the duties were performed by him. The fact Karian asserts is that because PC benefited from his, as opposed to Teplitsky's efforts, which worked to enhance the corporation, he has not asserted any damages or a cognizable claim for breach of duty. Lastly, counsel states that the mere commencement of an action by Teplitsky is not a breach of any fiduciary duty or obligation as an officer of the corporation; that Karian has failed to plead a breach of fiduciary duty with the requisite particularity; that the claim, which is for monetary damages only, is barred by a three-year statute of limitations pursuant to CPLR § 214(4).

Defendant claims that the Third Cause of Action, alleging breach of fiduciary duty against Dr. Teplitsky, despite his lack of standing as an officer, director or shareholder of

PC and in the absence of any contract creating any such fiduciary duty cannot stand. General reference to a series of contracts in which Teplitsky agreed to act as a spokesman for PC is insufficient to constitute a complaint for breach of contract. There is no evidence as to the existence of such contracts, their terms, or the manner in which they were breached. Dr. Teplitsky had no fiduciary relationship, since he was neither a stockholder, officer or director of PC. Teplitsky had no obligation to bring to the attention of the corporation or Karian the existence of what Karian refers to as "publicly available" information with respect to his standing in the medical community.. Counsel also claims the action is barred by the three-year statute of limitations; that because the bringing of an action by Ida Teplitsky was not a breach of a fiduciary duty, the allegation of aiding and abetting against Dr. Teplitsky fails to state a cause of action and, in any event, fails to meet the particularity in pleadings requirement of CPLR § 3016.

Counsel asserts general objections with respect to the service of the original summons, and improper service of the amended summons with notice; that the service of an amended summons without permission of the Court was impermissible and a nullity; that the action failed to name Lori Karian, a necessary party; and that PC should be dismissed as a plaintiff, since Karian lacks authority to cause PC to initiate an action against the Tepliskys.

Karian replies by asserting that an Amended Verified Complaint, dated December 30, 2010 has been served upon counsel for Teplitskys. His First Cause of Action asserts breach of fiduciary duty against Ida Teplitsky in that she has failed to perform her duties as Treasurer, and has commenced actions in Nassau County which are detrimental to PC and undertaken solely to benefit herself and her husband. The Second Cause of Action against Michael Teplitsky claims that he aided and abetted Ida Teplitsky's breach of a fiduciary duty. There is no statement as to the basis for the claim that the service of this document is authorized.

Adding to the kaleidoscopic nature of these proceedings, counsel for Karian serves

a "Reply Affirmation in Support of the Motion", which is in reality an unauthorized surreply. Nevertheless, in keeping with the general tenor of the proceedings to date, the Court has considered it. The essence of it is that there has never been a summons with the name of Lori Karian as a plaintiff; that the service of a second amended verified complaint without leave of Court is prohibited by CPLR § 3025, which permits a party to amend their pleading once without leave of court, and then, only if within 20 days of the service of the prior pleading.

The Second Amended Verified Complaint is disregarded by the Court, since there is no evidence that it was served in accordance with the requirements of the CPLR. The objections with respect to service of the prior complaint, essentially that it was not affixed to the recipient's door, failed to properly identify Michael Teplitsky, and that defendants received inadequate copies, are not of significance so as to warrant consideration.

Service of a Summons with Notice, while perfectly lawful, has frequently been criticized, with good reason. In this case its use has caused Karian to lose priority of filing with respect to the request for dissolution. Whether or not it was improperly contained in a complaint, as opposed to a petition, is irrelevant. The motion to dismiss the First Cause of Action based upon a prior action pending is granted. (*United Enterprises Ltd. v. Hill*, 185 A.D.2d 206 [1st Dept. 1992]).

The Second Cause of Action alleges a breach of fiduciary duty against Ida Teplitsky on the basis of her failure to perform her duties as a Treasurer, and by commencing actions in Nassau County which are frivolous in nature. The Court has previously noted that there is no fiduciary duty solely by virtue of the fact that the parties are engaged in a business venture. (*Roni, LLC, et al. v. Arfa, et al.*, 74 A.D.3d at 444). The question is whether the claims asserted can be construed to constitute a cognizable cause of action under any theory of law.

While ostensibly belied by the many year history of the operation of the corporation, with Karian conducting all of the day-to-day operations of PC, and financial records produced in

Destin, Florida and subsequently signed by Teplitsky, at this juncture the question is whether, reading the complaint in its most favorable light, it states a claim upon which relief can be granted. By resort again to BCL § 720 (a)(1)(A), the failure to perform the duties of a Director or Officer constitutes misconduct for which action can be brought. The motion to dismiss the Second Cause of Action is denied in that, by alleging a failure of Ida Teplitsky to perform her duties as Treasure, it states a cause of action under the statute.

The motion seeks to dismiss the Third Cause of Action, claiming a breach of fiduciary duty by Michael Teplitsky. It asserts that he was the founder of the company and acted in concert with Ida Teplitsky to breach her fiduciary duty by bringing a spurious action in Nassau County. Ida Teplitsky did not have a fiduciary duty, and Michael Teplitsky could not aid and abet a breach thereof.

As the promoter of a corporation, however, one does have a fiduciary duty to the corporation and its present and anticipated shareholders. (*Id.*). "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct". (*Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 [2d Dept. 2007]).

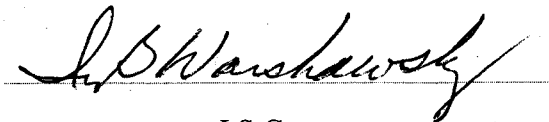
Certainly, the misconduct of Dr. Teplitsky in connection with his practice of medicine, and which is readily available on the internet, was not beneficial to the sale of the product for which he was the prime spokesman. Does this qualify as "misconduct" within the purview of the language in cases such as *Kurtzman*? The Court believes that it does not; rather the misconduct which constitutes one of the essential elements of a breach of fiduciary duty, must be limited to misconduct in the context of the operation in which the duty is owed. A contrary interpretation would be impossible to control, given the limitless misconduct of which human beings are capable. Because the misconduct to which plaintiff Karian refers was unrelated to Teplitsky's fiducial obligations to PC and its shareholders, the Third Cause of Action fails to state a claim upon which relief can be granted. The Third Cause

of Action is therefore dismissed.

To the extent that requested relief has not been granted. it is denied.

This constitutes the Decision and Order of the Court.

Dated: January 31, 2011



J.S.C.

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