SCAN

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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STEPHANIE HALL,

Plaintiff,

-against-

WOOD WENTWORTH, LTD., MICHAEL W. HALL, ALEXIS A. HALL, NICHOLAS G. HALL, BRUCE W. HALL, II and CHERYL A. HALL,

Defendants.

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TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 013921-10
Motion Seq. No: 1
Submission Date: 12/22/10

The following papers having been read on this motion:

Notice of Motion, Affirmation in Support and Exhibit.....x
Memorandum of Law in Support.....x [1]
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Affirmation, Reply Affidavit and Exhibits.....x
Reply Memorandum of Law.....x

This matter is before the Court for decision on the motion filed by Defendants Wood Wentworth, Ltd. ("Wentworth"), Michael W. Hall ("Michael"), Alexis A. Hall ("Alexis"), Nicholas G. Hall ("Nicholas"), Bruce W. Hall, II ("Bruce") and Cheryl A. Hall ("Cheryl") (collectively "Defendants") on October 21, 2010 and submitted on December 22, 2010. For the reasons set forth below, the Court grants Defendants' motion and dismisses the Verified Complaint.

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3211(a), dismissing the Verified Complaint ("Complaint"). Plaintiff Stephanie Hall ("Stephanie" or "Plaintiff") opposes the

[1] On consent of the parties, Defendant provided a revised Memorandum of Law that complies with the page limits set forth in the Commercial Division Rules.

motion.

B. The Parties' History

The Complaint (Ex. A to Macy Aff. in Supp.) alleges as follows:

Plaintiff was a minority shareholder of Wentworth. Michael, Alexis, Nicholas and Bruce are officers, directors and shareholders of Wentworth. Cheryl is an officer and shareholder of Wentworth. Plaintiff is the sister of Michael, sister-in-law of Cheryl and the aunt of Alexis, Nicholas and Bruce. Michael, Alexis, Nicholas, Bruce and Cheryl ("Individual Defendants") were and continue to be majority and controlling shareholders of Wentworth. The principal assets of Wentworth consist of real property located in Muttontown, New York, as well as stocks, bonds and cash.

In or about May of 2009, Wentworth sold 18 acres of the real property to the County of Nassau for the sum of over Eight Million Seven Hundred and Ten Thousand ($8,710,000.00) Dollars ("Sale"). In or about September of 2009, Defendants obtained a "summary appraisal" (Compl. at ¶ 28) ("Appraisal") of the remainder of the real property ("Property"), consisting of 98.92 acres, which valued the Property at $15,675,000 ("Appraised Value"). Plaintiff alleges that the Appraised Value failed to consider the Sale, or other sales most compatible with the Property.

By letter dated February 25, 2010, Michael, as President of Wentworth, sent to Plaintiff and other minority shareholders a letter offering the repurchase of Class B Preferred Stock and common stock of Wentworth ("Offer to Repurchase"). The Offer to Repurchase valued the Class B Preferred Stock at $30.00 per share and the common stock at $885.68 per share ("Valuation"). The Offer to Repurchase was non-negotiable and expired at midnight on March 25, 2010. The per share price contained in the Offer to Repurchase was based, in part, on the Appraisal.

Wentworth also advised the minority shareholders that, in the event they chose not to accept the Offer to Repurchase, Wentworth would 1) make a small dividend payout; 2) form a Delaware limited liability company ("LLC") to which Wentworth would contribute the Property in exchange for preferred and common membership interests in the LLC; and 3) offer to all eligible shareholders who did not accept the Offer to Repurchase the option to contribute cash to the LLC in exchange for common membership interests in the LLC.

Defendants apparently intended, upon transfer of the Property to the LLC, to develop the

Property by building and selling high-end single family residences on the Property. Defendants knew that Plaintiff would be financially unable to purchase a membership interest in the LLC and, therefore, would be compelled to accept the Offer to Repurchase. Defendants presented an intentionally depressed valuation of Wentworth's shares in order to compel Plaintiff to sell her interests at a sum less than their value. As officers and directors of Wentworth, and by virtue of their familial relationship to Plaintiff, Defendants owed Plaintiff a fiduciary duty.

Defendants did not participate in the Offer to Repurchase which allegedly permitted Wentworth to repurchase Plaintiff's shares for a deflated value, to Defendants' benefit. Plaintiff, through counsel, objected to the validity of the Appraisal and the Valuation. Plaintiff alleges that Defendants' actions were in bad faith, and that Defendants engaged in improper self-dealing.

The Complaint contains three (3) causes of action. In the first, Plaintiff alleges that Defendants breached their fiduciary duties to her, and seeks damages of at least $6.5 million dollars, as well as punitive damages. In the second, Plaintiff alleges that, in light of Defendants' breach of their fiduciary duties, Plaintiff is entitled to an accounting of the finances and assets of Wentworth. In the third, Plaintiff alleges that Defendants breached their duty of care, loyalty and good faith to Plaintiff and seeks damages of at least $6.5 million.

In his Affirmation in Support, counsel for Defendants submits that Plaintiff did not claim the rights of a dissenting shareholder, pursuant to Business Corporations Law ("BCL") § 623. Instead, Plaintiff accepted the "buy out" option in the Offer to Repurchase and received the sum of $1,789,197.84 ("Payment") as compensation for her shares. Plaintiff apparently made this election on the advice of counsel because, at the time of the Offer to Repurchase, Plaintiff commenced an action against the Defendants ("Prior Action"), in a matter assigned Index Number 010891/09, in which she sought inspection of the books and records of the Corporation. That action was withdrawn.

Plaintiff never filed an action in equity to enjoin the contribution of the Wentworth assets to the LLC. Defendants submit that Plaintiff, who is no longer a shareholder in Wentworth, is estopped, both by statute and common law, from seeking the relief set forth in the Complaint.

In his Affirmation in Opposition, counsel for Plaintiff ("Plaintiff's Counsel") disputes Defendants' assertion that Plaintiff waived, or is estopped from asserting, her rights with respect to her claim that the Valuation was improper. Specifically, on March 22, 2010, prior to the

expiration date of the Offer to Repurchase ("Expiration Date"), a conference call was conducted with Plaintiff's Counsel and counsel for the Defendants in the Prior Action ("Prior Counsel"). During this conversation, Plaintiff's Counsel advised Prior Counsel of Plaintiff's position with respect to the Appraisal and Valuation. Prior Counsel stated that Defendants believed it inappropriate to negotiate this claim while the Offer to Repurchase was outstanding, and agreed to let the offer "run its course" (Horz Aff. in Opp. at ¶ 3) and to discuss Plaintiff's right to additional sums after the Expiration Date. Prior Counsel also stated "[S]ounds right" (*Id.*) in response to Plaintiff's assertion that she could accept the offer and then pursue her claims for the difference in value through litigation or negotiation. As a result, Plaintiff accepted the Offer to Repurchase and the parties discontinued the Prior Action to avoid unnecessary costs and in the hope that the disputes could be resolved.

Negotiations between the parties failed. By letter dated April 19, 2010 (Ex. B to Horz Aff. in Opp.), Plaintiff's Counsel advised Prior Counsel that, if the parties were unable to settle the matter, Plaintiff was "authorized to commence an action...to recover [Plaintiff's] damages sustained by virtue of [the] wrongful valuation of the shares..." Plaintiff submits that, as she clearly advised Defendants of her intention to pursue these claims if the matter could not be resolved, Defendants' estoppel and standing arguments are without merit.

In his Reply Affirmation, Prior Counsel disputes Plaintiff's Counsel's claims that Plaintiff's Counsel requested, and Prior Counsel agreed, that Defendants waive any defenses asserted in the Prior Action, or any other action contemplated by Plaintiff. Rather, Prior Counsel advised Plaintiff's Counsel that it was Defendants' position that the Offer to Repurchase, or alternative payment of a dividend, ended the dispute between the parties. Prior Counsel advised Plaintiff's counsel, further, that Defendants did not agree that Plaintiff had a meritorious claim and Defendants would voice their opposition to Plaintiff's claim in any relevant litigation.

C. The Parties' Positions

Defendants submit, *inter alia*, that 1) as Plaintiff failed to pursue her options of seeking to enjoin the sale pursuant to BCL § 623(k), or rejecting the Offer and seeking the Court's review of the share price pursuant to BCL §§ 623, 909 and 910, she is estopped from pursuing this action; 2) Plaintiff, who is no longer a shareholder in Wentworth, lacks standing to pursue what is, in effect, a derivative action to recover alleged damages to Wentworth; 3) even if she were still a shareholder, Plaintiff lacks standing to pursue the action; and 4) even if Plaintiff has

standing, the allegations in the Complaint are insufficient to overcome the presumption of the business judgment rule.

Plaintiff submits, *inter alia*, that 1) BCL § 623 is inapplicable to the matter at bar because no merger had been formerly proposed, voted on or been the subject of a notice of meeting for a vote; 2) assuming, *arguendo*, that BCL § 623 is applicable, Defendant failed to provide Plaintiff with notice of appraisal rights; 3) Plaintiff may pursue an individual cause of action against Defendants for their allegedly intentional undervaluation of Plaintiff's shares because it constitutes a wrong that is personal to Plaintiff, and independent of the wrong to the corporation; and 4) Plaintiff is not estopped from asserting this action given that it was Prior Counsel who suggested that the parties proceed with the stock repurchase and thereafter discuss the Valuation.

In Reply, Defendants submit that, by accepting the Offer to Repurchase, delivering her shares to the Corporation and accepting the Payment, Plaintiff waived all of her other remedies, notwithstanding the assertion of Plaintiff's Counsel that there was an informal agreement between counsel that Plaintiff's rights to challenge the Valuation were reserved. Plaintiff elected not to pursue her remedies of seeking an injunction to enjoin the transfer of Wentworth's assets, or exercising her appraisal right and, therefore, may not now challenge the transfer.

RULING OF THE COURT

A. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are

flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

CPLR § 3211(a)(3) provides for dismissal of an action where the party asserting the cause of action lacks the legal capacity, or standing, to sue. Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute. *Matter of Eaton Assoc. Inc. v. Egan*, 142 A.D.2d 330, 334-335 (3d Dept. 1988), citing *Allen v. Wright*, 468 U.S. 737, 750-751 (1984), *reh. den.*, 468 U.S. 1250 (1984). Standing involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution. *Graziano v. County of Albany*, 3 N.Y.3d 475, 479 (2004), quoting *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). A plaintiff must thus demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. *Caprer v. Nussbaum*, 36 A.D.3d 176, 183 (2d Dept. 2006), citing *Matter of Fritz v. Huntington Hosp.*, 39 N.Y.2d 339 (1976).

B. Rights of Dissenting Shareholders

Under New York law, shareholders who do not assent to a merger have the right to receive payment for the fair value of their shares. The remedy available to those who have perfected their status as dissenting shareholders is to enforce this right through an appraisal proceeding. *Czajkowski v. Jovanovich*, 1994 U.S. App. LEXIS 14153 (9th Cir. 1994), [2] quoting *Cawley v. SCM Corp.*, 72 N.Y.2d 465 (1988) and citing BCL § 623 and *Burke v. Jacoby*, 981 F.2d 1372, 1380 (2d Cir. 1992), *cert. den.*, 113 S. Ct. 2338 (1993).

BCL § 623(k) provides:

> The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

As interpreted by New York courts, BCL § 623(k) makes an appraisal proceeding a dissenting shareholder's exclusive remedy except in a narrow class of cases. *Czajkowski*, 1994

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[2] The issues before the *Czajkowski* Court, which related to a New York corporation, were governed by New York law. 1994 U.S. App. LEXIS 14153, *2-3.

U.S. App. LEXIS 14153 at **5, citing *Burke*, 981 F.2d at 1380 and *Cawley*, 72 N.Y.2d at 1267. The exception to this general rule requires the plaintiff to bring an "appropriate action" for equitable relief for unlawful or fraudulent corporate action. *Id.*, citing *Cawley* at 1267.

The definition of an "appropriate action" was best expressed by Justice Mangano in dissent in *Walter J. Schloss Assocs. v. Arkwin Indus.*, 90 A.D.2d 149 (2d Dept. 1982), which dissent was ultimately adopted by the Court of Appeals in reversing the Second Department in *Walter J. Schloss Assocs. v. Arkwin Indus.*, 61 N.Y.2d 700 (1984). In *Schloss*, the Second Department affirmed the Order of the trial court that 1) denied defendants' motion to dismiss the complaint on the grounds that the appraisal procedures established by BCL § 623 were plaintiff-minority stockholder's exclusive remedy for the injuries alleged in the complaint; and 2) granted plaintiff's cross motion seeking permission to maintain the action as a class action. *Id.* at 151. The Second Department expressed its agreement with the trial court's conclusion that the appraisal procedures under BCL § 623 were not the exclusive remedies for the injuries asserted, and plaintiff's failure to avail itself of these procedures did not bar plaintiff's action for an accounting and damages. *Id.* at 152.

In his dissent, Justice Mangano noted as follows:

> [BCL § 623] recognizes a shareholder's right to object to corporate action, including merger, and establishes procedures for a dissenting shareholder to elect and demand payment of the fair value of his shares. If the corporation fails to make a written offer to each electing shareholder to pay for his shares at a specified price considered as fair by the corporation, or if any dissenting shareholder or shareholders disagree with the price offered ([BCL §§ 623(g), (h)]), a special proceeding may be instituted in the Supreme Court...to determine the rights of dissenting shareholders and to fix the fair value of their shares ([BCL § 623(h)]). Either the corporation ([BCL § 623(h)(1)]) or the dissenter may institute such a proceeding ([BCL § 623(h)(2)], but the latter may only act upon the former's failure to do so.
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> Finally, in [BCL § 623(k)], the statute declares that the enforcement by a shareholder of his right to receive payment for his shares in the manner provided in section 623 shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership. An exception to this general rule, however, is expressly stated in the same subdivision, viz., "that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him". Thus, shareholders objecting to corporate action, such as merger, will have, in the notice of election and demand, and judicial appraisal procedures of section 623, an exclusive remedy for enforcing their shareholder rights. Nevertheless, a dissenting shareholder may, under the exception in subdivision (k), bring an action alleging fraud

> or illegality, but only if such is an appropriate action. What then is an appropriate action?
>
> *Schloss*, 90 A.D.2d at 154.

Justice Mangano outlined relevant case law on the issue, including *Breed v. Barton*, 54 N.Y.2d 82 (1981), in which the Court of Appeals held that, to be an appropriate action, any monetary recovery, if available at all, can only be ancillary to a grant of some form of equitable relief. *Id.* at 87. Justice Mangano concluded that "in the face of 'the availability or exercise of the right of appraisal,' the only other remedy authorized by [BCL § 623(k)] for the enforcement of a dissenting shareholder's rights is an action in equity alleging fraudulent or illegal corporate activity and requesting some form of equitable relief [internal citations omitted]." *Schloss*, 90 A.D.2d at 161. *See also McCully v. Jersey Partners, Inc.*, 60 A.D.3d 562 (1st Dept. 2009) (sole exception to plaintiff's exclusive remedy of appraisal of fair value of shares is right to assert claim for equitable relief ground in allegations of unlawful or fraudulent conduct by corporation as to plaintiff).

C. Estoppel

The elements of estoppel are, with respect to the party estopped: 1) conduct that amounts to a false representation or concealment of material facts, 2) intention that such conduct will be acted upon by the other party, and 3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: 1) lack of knowledge of the true facts, 2) reliance upon the conduct of the party, and 3) a prejudicial change in his position. *Id.* at 577, citing *Airco Alloys Div. V. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 (4th Department 1980). *See Springside Land Company, LLC v. Board of Managers of Springside Condominium I*, 56 A.D.3d 654 (2d Dept. 2008) (defendant entitled to dismissal of cause of action based on equitable estoppel where both parties knew of true facts).

D. Application of these Principles to the Instant Action

The Court concludes that the instant action is precluded by virtue of Plaintiff's acceptance of the Offer to Repurchase, delivery of her shares to the Corporation and acceptance of the Payment. Plaintiff, as a shareholder who disagreed with the price offered by Wentworth, could have filed a special proceeding pursuant to BCL § 623 to determine her rights and fix the fair value of her shares but did not do so. By electing to accept the "buy out" option in the Offer

to Repurchase, and receiving the Payment of $1,789,197.84 as compensation for her shares, Plaintiff waived her remedies pursuant to the BCL. Moreover, the Court concludes that the instant action is not viable as an "appropriate action" pursuant to BCL § 723(k) alleging fraudulent or illegal corporate activity and requesting some form of equitable relief. This is not a situation in which the request for money damages is "ancillary" to the request for equitable relief. *See Breed v. Barton*, discussed *supra*. Rather, the gravamen of the Complaint is a request for damages in the sum of $6.5 million, as well as punitive damages, that also contains a cause of action for an accounting, an equitable remedy. The Court determines that, under these circumstances, the Complaint is not an "appropriate action" authorized by the BCL.

The Court also rejects Plaintiff's estoppel argument, in light of the Court's conclusion that all parties were aware of the true facts at the time of the statements of Prior Counsel on which Plaintiff purportedly relies. Specifically, at the time of the conference call to which Plaintiff refers, both sides were aware of the terms of the Offer to Repurchase. Plaintiff's knowledge of the relevant details is further demonstrated by her filing of the Prior Action with respect to the Offer to Repurchase.

In light of the foregoing, the Court dismisses the Complaint.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
March 3, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.