

<b>Barthelemy v Mondesir</b>
2011 NY Slip Op 34118(U)
February 18, 2011
Supreme Court, Bronx County
Docket Number: 0250384/2009
Judge: Lucindo Suarez
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**PART 19**

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

**BARTHELEMY, JEAN, et al**

Index No. 0250384/2009

- against -

Hon. LUCINDO SUAREZ,

Justice.

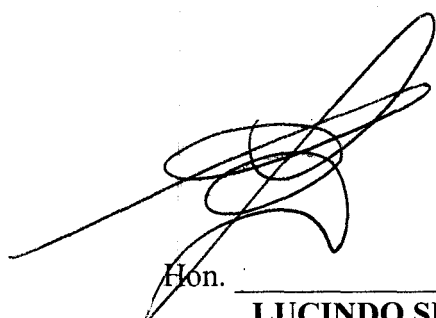
**MONDESIR, JEAN, et al**

The following papers numbered 1 to 12 read on this motion, **BILL OF PARTICULARS/PRECLUDE**  
 Noticed on **February 1, 2011** and duly submitted as No. 28 on the Motion Calendar of **February 1, 2011**

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3, 4	
Notice of Cross-Motion - Order to Show Cause - Exhibits and Affidavits Annexed	5, 6, 7	
Answering Affidavit and Exhibits	8, 9, 10	
Replying Affidavit and Exhibits	11	
Sur-replying Affidavit and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers	12	
Memoranda of Law		

Upon the foregoing papers, defendants' cross-motion to dismiss plaintiffs' complaint is granted in part, in accordance with the annexed decision and order.

Dated: 02/18/2011



Hon.

LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

-----X

JEAN BARTHELEMY, ALPHONSE DUVAL, FRANTZ  
BARTHELEMY, JEAN ANDRE OCCEAN, BENOIT  
ZAMA, YVES LOUIS, JEAN SAINTVIL, OSNER  
CHARLES, SAKDA SAEVANE, RUBBE CESAR,  
ALEX ALAEI, RICARDO S. ESTUPINAN, JEAN MAX  
JUSTE, GEORGES ANTOINE, LONDRES  
MAHOTIERE, FRITZ M. BRICE, CHARLES  
NICOLAS, SURAPONG SUWANSIRI, SONGVUT  
RUEPPOKANON, MINGTA WEE PRUEKWATANA,  
BALVIR SINGH AND NICOLE PIERRE JULES  
derivatively and on behalf of CITYWIDE CORPORATE  
TRANSPORTATION, INC., and representatively on  
behalf of all similarly situated shareholders,

DECISION AND ORDER

Index No. 250384/2009

Plaintiffs,

- against -

JEAN MONDESIR, JACK GALATI, PAT DYRUTA  
a/k/a PAT KIET, LOURMEL APOLLON, EFRAIN  
IVAN MARTINEZ, SURJIT SINGH, WEERA  
VONGSOASUP, ANGELO CIAVARELLA, EDWIN  
SEMEXAND and CHARLES JOSEPH, CITYWIDE  
CORPORATE TRANSPORTATION, INC.,

Defendants.

-----X

PRESENT: Hon. Lucindo Suarez

Upon plaintiffs' notice of motion dated December 31, 2010 and the affirmations and exhibits submitted in support thereof; defendants' notice of cross-motion dated January 24, 2011 and the affirmation and exhibit submitted in support thereof; plaintiffs' affirmation in opposition dated February 8, 2011 and the affidavit and exhibits annexed thereto; defendants' reply affirmation dated February 9, 2011; the decision and order of Hon. John A. Barone, J.S.C., dated February 10, 2011 referring defendants' cross-motion to the undersigned; and due deliberation; the court finds:

Plaintiffs bring this shareholder derivative action against defendants Citywide Corporate

Transportation, Inc. (“Citywide”) and its officers and directors alleging that defendants wasted corporate assets, wrongfully misappropriated and misapplied corporate funds, and breached their fiduciary duties to Citywide and its shareholders. Defendants Jean Mondesir, Jack Galati, Pat Dyruta a/k/a Pat Kiet, Lourmel Apollon, Efrain Ivan Martinez, Surjit Singh, Weera Vongsoasup and Edwin Semexand (collectively “movants”) cross-move pursuant to CPLR 3211(a)(7) for an order dismissing plaintiffs’ tenth cause of action seeking punitive damages on the basis that punitive damages cannot be asserted as a separate cause of action. Defendants also move pursuant to CPLR 3211(a)(3) to dismiss the complaint of plaintiff Londres Mahotiere (“Mahotiere”) on the basis that Mahotiere was not a Citywide shareholder and thus lacks the legal capacity to maintain his action.

On a motion to dismiss, courts will “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 874 N.E.2d 720, 722 (2007); *see also Leon v. Martinez*, 84 N.Y.2d 83, 88, 638 N.E.2d 511, 513 (1994). A motion to dismiss based on documentary evidence may be granted when the documents establish a defense as a matter of law. *Held v. Kaufman*, 91 N.Y.2d 425, 430-431, 694 N.E.2d 430, 433 (1998).

It has been held that “there is no independent cause of action for punitive damages.” *Mayes v. UVI Holdings, Inc.*, 280 A.D.2d 153, 161, 723 N.Y.S.2d 151, 157 (1st Dep’t 2001) (internal citation omitted); *see also Goldstein v. Winard*, 173 A.D.2d 201, 569 N.Y.S.2d 425 (1st Dep’t 1991). A claim for punitive damages “constitutes merely an element of the single total claim for damages on the underlying causes of action.” *Steinberg v. Monasch*, 85 A.D.2d 403, 406, 448 N.Y.S.2d 200, 202 (1st Dep’t 1982) (internal citations omitted); *see also Rocanova v. Equitable Life Assur. Soc’y*, 83 N.Y.2d 603, 634 N.E.2d 940 (1994) (stating that “[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action”). Thus, movants’ cross-

motion dismissing plaintiffs' tenth cause of action for punitive damages is granted.

Movants also seek dismissal of Mahotiere's claims against them on the ground that Mahotiere was never a Citywide shareholder and therefore has no legal capacity to maintain his action. A party bringing a shareholder derivative action must be a holder of shares in the corporation at the time the action was brought and at the time of the transaction of which the shareholder complains, unless the ownership interest devolved upon him by operation of law. *See* Business Corporation Law § 626(b); *see also Pessin v. Chris-Craft Industries, Inc.*, 181 A.D.2d 66, 586 N.Y.S.2d 584 (1st Dep't 1992). A plaintiff in a shareholder derivative action loses the right to prosecute the action if he ceases to be a shareholder. *Rubinstein v. Catacosinos*, 91 A.D.2d 445, 446, 459 N.Y.S.2d 286, 287 (1st Dep't 1983). Here, movants fail to submit a copy of Citywide's shareholder list or any other document in support of its motion to establish that Mahotiere was never shareholder. In any event, Mahotiere states in his affidavit submitted in opposition that he has owned a single share of Citywide stock continuously since 1996, and the specific actions plaintiffs complained of took place after 2001. Absent documentary evidence establishing that Mahotiere was not a shareholder during that period, movants' cross-motion dismissing Mahotiere's claims is denied.

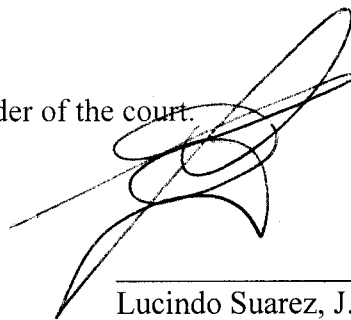
Accordingly, it is

ORDERED, the motion of defendants Jean Mondesir, Jack Galta, Pat Dyruta a/k/a Pat Kiet, Lourmel Apollon, Efrain Ivan Martinez, Surjit Singh, Weera Vongsoasup and Edwin Semexand dismissing plaintiffs' tenth cause of action and plaintiff Londres Mahotiere's claims is granted in part; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Jean Mondesir, Jack Galati, Pat Dyruta a/k/a Pat Kiet, Lourmel Apollon, Efrain Ivan Martinez, Surjit Singh, Weera Vongsoasup and Edwin Semexand dismissing plaintiffs' tenth cause of action against them.

This constitutes the decision and order of the court.

Dated: February 18, 2011



A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

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Lucindo Suarez, J.S.C.