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| <b>Goncalves v Iberian Concrete Co., Inc.</b>                                                                                                                                                                                    |
| 2012 NY Slip Op 32939(U)                                                                                                                                                                                                         |
| December 6, 2012                                                                                                                                                                                                                 |
| Supreme Court, Suffolk County                                                                                                                                                                                                    |
| Docket Number: 26001-2011                                                                                                                                                                                                        |
| Judge: Emily Pines                                                                                                                                                                                                               |
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SHORT FORM ORDER

INDEX NUMBER: 26001-2011

**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

COPY

*Present:* **HON. EMILY PINES**

J. S. C.

Original Motion Date: 08-14-2012

Motion Submit Date: 09-25-2012

Motion Sequence No.: 003 MG

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X

**EILEEN GONCALVES, individually and  
 derivatively as a shareholder of IBERIAN  
 CONCRETE CO., INC.,**

**Petitioner - Plaintiff,**

**-against-**

**IBERIAN CONCRETE CO., INC., ALFRED J.  
 HESS, GUY DASILVA, JOSE A. DASILVA,  
 GARY DASILVA, DENNIS DASILVA,**

**Respondents - Defendants,**

**and STAR READY - MIX, INC.,**

**Defendant**

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In this shareholder's derivative action/dissolution proceeding, defendant Star Ready-Mix, Inc. ("Star") moves (Mot. Seq. # 003) for an order pursuant to CPLR 3103 granting a protective order striking the Notice for Discovery and Inspection dated January 16, 2012, served upon it by plaintiff and limiting discovery to information relevant to the fair value of plaintiff's shares in Iberian Concrete Co., Inc. ("Iberian"). Plaintiff opposes the motion.

### *Factual and Procedural Background*

Plaintiff Eileen Goncalves, individually and derivatively as a shareholder of Iberian, commenced this action on August 17, 2011, against Iberian, Alfred J. Hess. Guy DaSilva, Jose A. DaSilva, Gary DaSilva, Dennis DaSilva, and Star. The Verified Petition/Complaint contains three causes of action. The first is a derivative action pursuant to BCL § 626 for breach of contract against Star based upon Star's purported breach of a lease agreement for real property owned by Iberian. The second cause of action is for dissolution of Iberian pursuant to BCL § 1104-a based upon alleged oppressive conduct by the individual defendants, Iberians officers and directors. The third cause of action is asserted against the individual defendants for breach of fiduciary duty, unjust enrichment, and self-dealing.

On or about October 26, 2011, Iberian served an Election to Purchase Shares of Minority Shareholder Pursuant to Section 1118 of the Business Corporation Law.

On or about December 23, 2011, counsel for all parties entered into a Stipulation, which was "So-Ordered" by the Court, pursuant to which it was agreed, in relevant part:

1. All claims pleaded in this hybrid proceeding are hereby stayed, pending the determination of the fair value of Petitioner's shares, subject to the discovery hereinafter provided for and further discovery demands as per the CPLR.
2. [Iberian] shall provide Petitioner's counsel with all financial records and tax returns of [Iberian] for a period of five years prior to the valuation date, within ten days after counsel for Petitioner advises counsel for [Iberian], in writing, of all such financial records and tax returns he seeks to examine and copy.
3. Petitioner and the President of [Iberian] will submit to depositions on all matters reasonably related to the fair value of Petitioner's shares on the valuation date, at such dates and at such places as the attorneys for the parties shall determine.
4. The parties shall exchange all real estate appraisals and valuation reports prepared by experts retained by the parties, and to produce such experts for depositions on such dates and at such places as the attorneys for the parties shall

determine.

Pursuant to a further Stipulation dated January 10, 2012, which references the Stipulation dated December 23, 2011, all counsel agreed that (1) plaintiff would serve notices for a notice for discovery and inspection by February 10, 2012, (2) defendants would respond to said notices by March 12, 2012, (3) examinations before trial of plaintiff and Iberian would be conducted on or before April 30, 2012, and (4) real property appraisals would be exchanged by April 30, 2012.

Plaintiff served a Notice for Discovery and Inspection dated January 16, 2012, upon Star seeking, among other things, minutes of Star's shareholder meetings, Star's shareholder resolutions, minutes of meeting of Star's board of directors, Star's by-laws, stock transfer ledger, general ledger, cash receipts journal, all communications between Star and Iberian, inventory information, check register, invoices, bills, financial statements, and payroll reports. By letter dated January 19, 2012, counsel for Star rejected the Notice for Discovery and Inspection on the grounds that it violated the Stipulation dated December 23, 2011, and was overly broad.

On or about May 23, 2012, counsel for the parties entered into another Stipulation and Order, which provides, in relevant part:

2. Undersigned counsel concur that discovery as to wrongful acts and conduct for the purpose of justifying dissolution has been obviated by Iberian's exercise of its Election to Purchase Shares of Minority Shareholder pursuant to BCL § 1118. The scope of discovery shall include and extend to all matters that are reasonably related to the assets and/or liabilities of Iberian or valuation of the Plaintiff's Iberian stock.

\* \* \*

6. Additional discovery reasonably related to the assets and/or liabilities and/or the valuation of Iberian may be conducted pursuant to the CPLR and Rules of Court.

### ***Discussion***

As recently set forth by the Appellate Division, Second Department in *County of Suffolk v Long Is. Power Auth.* (— AD2d —, 2012 NY Slip Op 08087 [2d Dept 2012]):

“CPLR 3101(a) provides that ‘[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.’ Nevertheless, unlimited disclosure is not mandated, and the rules provide that the court may issue a protective order ‘denying, limiting, conditioning or regulating the use of any disclosure device’ to ‘prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts’ (CPLR 3103[a]; see *Accent Collections, Inc. v Capelli Enters., Inc.*, 84 AD3d 1283; *Spohn-Konen v Town of Brookhaven*, 74 AD3d 1049; *Palermo Mason Constr. v Aark Holding Corp.*, 300 AD2d 460, 461). ‘Generally, the supervision of disclosure is left to the broad discretion of the trial court, which must balance the parties’ competing interests’ (*Accent Collections, Inc. v Cappelli Enters. Inc.*, 84 AD3d at 1283; see *Kooper v Kooper*, 74 AD3d 6, 17; *Palermo Mason Constr. v Aark Holding Corp.*, 300 AD2d at 461).”

Here, the parties charted their own course with regard to discovery by entering into the various stipulations. They specifically agreed that all claims in this action/proceeding, including the derivative claim for breach of contract against Star, are stayed pending the determination of the fair value of Plaintiff’s shares of Iberian. It was also agreed that at this stage the scope of discovery is limited to matters that are reasonably related to the assets and/or liabilities of Iberian and/or the valuation of Iberian. The Court finds that the scope of the Notice for Discovery and Inspection dated January 16, 2012, served by the plaintiff seeks information that is beyond the scope of the limited discovery agreed to by the parties in that the information sought is not reasonably related to the assets and/or liabilities and/or valuation of Iberian. While the plaintiff is certainly entitled to discovery from Star regarding the amount of rent paid by or due from Star to Iberian during the relevant time period, the Court disagrees that the collectability from Star of any rent it may owe Iberian is not reasonably related to the assets and/or liabilities and/or valuation of Iberian. Rent owed by Star to Iberian is simply a receivable of Iberian, whether collectable from Star or not. Plaintiff is also clearly entitled to discovery regarding the terms of any

lease or other agreement(s) between Star and Iberian concerning the payment of rent by Star to Iberian. However, contrary to plaintiff's contention, Star's financial statements are not relevant to a determination of the fair amount of rent, if any, that Iberian should have been charging Star. Finally, in light of the stipulations between the parties limiting the scope of discovery, the allegations of self-dealing, breach of fiduciary duties and/or conflict of interest are not relevant at this time. Accordingly, it is

**ORDERED** that Star's motion for a protective order striking the Notice for Discovery and Inspection dated January 16, 2012, served upon it by plaintiff is granted.

This constitutes the **DECISION** and **ORDER** of the Court.

**Dated: December 6, 2012**  
**Riverhead, New York**

  
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**EMILY PINES**  
**J. S. C.**

[ ] FINAL  
[ x ] NON FINAL