

Gordon v Credno

2012 NY Slip Op 33180(U)

January 9, 2012

Supreme Court, New York County

Docket Number: 603085/09

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

Index Number : 603805/2009
GORDON, ALAN D.
 vs.
CREDNO, JR, FREDERICK
 SEQUENCE NUMBER : 001
 DISMISS

INDEX NO. 603805/09
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

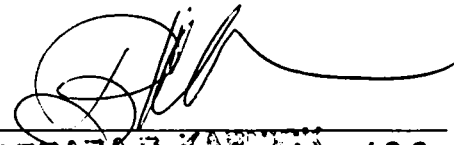
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH:
ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/9/12



 BARBARA R. KAPNICK J.S.C.
 J.R.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

-----X
ALAN D. GORDON, individually, and on behalf
of SKYLINK AVIATION (WYOMING), INC.

Plaintiff,

-against-

FREDERICK W. CREDNO, JR. a/k/a FREDERICK
CREDNO, DONALD J. MOSS, DAVINDER SEHMI,
SKYLINK AIR AND LOGISTIC SUPPORT (USA),
INC., SPORTSFLIGHT AIR INC., HARJIT S.
KALSI, TERESA HEISSERMAN, and JIM ROGERS,

Defendants.

DECISION/ORDER

Index No. 603805/09
Motions Seq. Nos.
001 and 002

-----X
BARBARA R. KAPNICK, J.S.C.:

Motion sequence nos. 001 and 002 are consolidated herein for disposition. In motion sequence no. 001, defendant Frederick W. Credno, Jr. ("Credno") moves, pursuant to CPLR 3211 (a) (1), (3), (5), (7), and (10), CPLR 3013 and 3106 (b), for an order dismissing the Complaint as to him, and, upon dismissal of the derivative claims in the Complaint, awarding him attorneys' fees, pursuant to Wyoming law. In motion sequence no. 002, defendants SkyLink Air and Logistic Support (USA) ("SkyLink USA"), Harjit S. Kalsi ("Kalsi"), Davinder Sehmi ("Sehmi"), Donald J. Moss ("Moss"), and SportsFlight Air Inc. ("SportsFlight") (collectively, the "002 defendants") move to dismiss the Complaint as to them, pursuant to the same CPLR sections, as well as CPLR 3211(a)(8) and 306-b, and also seek attorneys' fees in the event that the derivative claims are dismissed.

Background

According to the Complaint, plaintiff Alan Gordon ("Gordon") is a shareholder of SkyLink Aviation (Wyoming), Inc. ("SkyLink Wyoming") and owns 30% of all its common stock.¹ Starting in or about 2003 and until 2005, defendant SkyLink USA engaged Gordon to perform legal services.

The Complaint alleges that Gordon performed legal services for and on behalf of SkyLink USA at agreed upon fees from his office in New York. Gordon claims that he is owed unpaid fees and disbursements in a sum exceeding \$1,500,000 for the legal services performed (first cause of action).

Gordon next asserts a cause of action for unjust enrichment, alleging that SkyLink USA has been unjustly enriched by the fair and reasonable value of the legal services rendered and disbursements incurred by Gordon, for and on behalf of SkyLink USA, in a sum in excess of \$1.5 million (second cause of action).

The third cause of action is pled against SkyLink USA for *quantum meruit*, based on the same allegations alleged in the second cause of action.

The fourth cause of action is pled against defendant Credno, and alleges that in or about 2003, Credno entered into an agreement

¹ This fact is disputed.

with Gordon, for an indefinite duration. The agreement allegedly was for Gordon to "continue to perform services for SkyLink USA and Credno, and to be available to Credno at almost any time night or day, by telephone and/or e-mail." (Complaint, ¶ 37). In exchange, Gordon was allegedly eventually going to receive a 10% share of common stock of SkyLink USA, and until that transfer could be effectuated, Gordon was to receive an amount equal to 10% of the annual profits of SkyLink USA. Gordon alleges that he relied on this agreement in performing his services from 2003 until 2005.

The fifth cause of action is also pled against Credno and alleges that in late 2004, Credno approached Gordon regarding his plans to develop a business in the Middle East (excluding Iraq), similar to that of SkyLink USA. Thereafter, Gordon agreed to take an 8% equity interest in the business and began making efforts to develop the business. In February 2005, non-party Walter Arbib ("Arbib") individually and on behalf of SkyLink USA, commenced a lawsuit against Credno, Credno's son and Gordon to stop them from going forward with the new business plan, allegedly so that Arbib and/or SkyLink Aviation, Inc. ("SkyLink Canada") could do such business themselves without competition. At the same time, Credno allegedly agreed to indemnify, defend and hold Gordon harmless from and against any and all claims, losses or liabilities of any kind related to the lawsuit. In reliance upon this agreement, Gordon assisted Credno in obtaining legal counsel and then agreed to pursue a joint defense of the lawsuit. However, Credno settled the

case on his and his son's behalf, and Gordon was compelled to defend against the claims by himself. Gordon now claims damages in a sum in excess of \$10 million for breach of the alleged indemnity agreement.

The sixth cause of action is pled against defendants Credno, SkyLink USA, SportsFlight, Moss, Sehmi, Kalsi, Heisserman and Rogers. It alleges that in or about 2003, SkyLink Wyoming owned 60% of the common stock of SkyLink USA, that Gordon was one of three directors of SkyLink Wyoming and SkyLink USA, and Credno was a director and president of SkyLink USA.

In or about December 2003, Credno, SkyLink USA, SportsFlight, Moss, Sehmi, Kalsi, Heisserman and Rogers caused SkyLink USA to effectuate the sale of an 8% equity interest that SkyLink Wyoming held in SkyLink USA to SportsFlight. Another 5% was sold to Sehmi. According to the Complaint, these transactions were made without proper authority of the board of directors of either SkyLink Wyoming or SkyLink USA. Gordon alleges that these transactions were fraudulent because proper consideration was not paid and what amounts were paid were diverted to SkyLink Canada and/or to Arbib and/or Surjit Babra, the shareholders of SkyLink Canada. Gordon also claims that it would be futile to demand that the officers of SkyLink Wyoming correct their "fraudulent, deceptive, wrongful and self-serving actions."

The seventh cause of action is also pled against Credno, SkyLink USA, SportsFlight, Moss, Sehmi, Kalsi, Heisserman and Rogers and alleges breach of contract or implied contract based on the same actions that underlie the sixth cause of action.

The eighth cause of action is pled against Credno and SkyLink USA for breach of their fiduciary duties owed to SkyLink Wyoming and Gordon, and seeks a judgment directing Credno and SkyLink USA to reissue to SkyLink Wyoming and Gordon the shares transferred to Sehmi and SportsFlight.²

Finally, the ninth cause of action is pled against Credno, SkyLink USA, SportsFlight, Moss, Sehmi, Kalsi, Heisserman and Rogers, and seeks a judgment rescinding the said stock transfers and directing the return of all distributions on account of such transfers or, in the alternative, a money judgment in the amount of all such distributions.

Motion Sequence No. 001

Defendant Credno argues that the fourth cause of action, which seeks to recover legal fees in the amount of 10% of SkyLink USA's annual revenues plus 10% of SkyLink USA's common stock, fails to state a claim for breach of contract. Defendant argues in the first instance that the alleged fee agreement is facially excessive

² Plaintiff has now withdrawn that part of this cause of action alleging a breach of fiduciary duty on the part of SkyLink USA.

and violates New York's attorney disciplinary rules. Because Gordon was allegedly retained in 2003, defendant cites DR 2-106, which provided that excessive fees were prohibited.³ Defendant argues that to sustain his claim, Gordon must plead facts showing that the fees were "fair, reasonable and fully known and understood" by Credno. (*King v Fox*, 7 NY3d 181, 191 [2006]). Defendant argues that Gordon has failed to meet this burden because the Complaint does not contain any specific facts about what types of services he agreed to provide or what services he actually provided. Defendant contends that Gordon has already been paid \$200,000 by SkyLink USA for his work and that the additional \$1.5 million that he seeks is based on nothing more than vague assertions and constitutes double billing.

However, neither the *King v Fox* case, nor *Jacobson v Sassower* 66 NY2d 991 (1985), upon which Credno also relies, discusses pleading requirements. *King v Fox* concerned issues pertaining to the ratification of fee agreements, while *Jacobson v Sassower* dealt with the construction of a fee agreement. Even if the evidence at trial ultimately shows that the fees claimed by plaintiff are disproportionate to the work that plaintiff performed for SkyLink USA, plaintiff may be able to prevail on his claim, because a "general retainer whereby an attorney is paid solely for keeping him or herself available" is not *per se* unenforceable. (*Atkins &*

³ Effective April 1, 2009, New York adopted the Rules of Professional Conduct. Rule 1.5(a) is nearly identical to DR 2-106.

O'Brien v ISS Intl. Serv. Sys., 252 AD2d 446, 448 [1st Dept 1998]; accord *Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360 [1st Dept 2008], *lv to app dismiss* 11 NY3d 904 [2009], *lv to app den* 14 NY3d 703 [2010]]. In fact, as discussed below, plaintiff alleges that he worked long hours on behalf of SkyLink USA.

Additionally, defendants argue that the fourth cause of action must be dismissed because the Complaint does not allege the existence of a written retainer agreement, as required by New York law. (See, 22 NYCRR 1215.1) Without a written retainer agreement, defendant argues that a breach of contract claim cannot be upheld and the attorney is limited to *quantum meruit* recovery. See *Nabi v. Sells*, 70 AD3d 252, 255 (1st Dep't 2009). Here, a *quantum meruit* cause of action has not been pled against defendant Credno.

Plaintiff argues in opposition that with respect to the fourth cause of action, the fee arrangement is fully supported by the e-mail exchanges between Gordon and Credno. Plaintiff further argues that this arrangement is akin to a contingency fee and need not be formally executed to be enforceable.

Generally, an attorney's failure to comply with 22 NYCRR 1215.1 bars him, or her, from suing to recover fees on a claim of breach of contract, although it does not bar claims in quantum meruit, or on an account stated, claims which are not pled against Credno here. See *Miller v Nadler*, 60 AD3d 499 (1st Dept 2009);

Seth Rubenstein P.C. v Ganea, 41 AD3d 54 (2d Dept 2007). Plaintiff states in his Affidavit in Opposition sworn to November 15, 2010 that, at Credno's suggestion, he entered into an agreement pursuant to which he would be available "on a 24/7 basis" for work on behalf of SkyLink USA, in exchange for Credno's personal pledge of 10% of the shares of that company; that Credno personally promised that until such transfer of shares would be effectuated, plaintiff would be paid 10% of the profits of SkyLink USA; and that e-mails between plaintiff and Credno reflect these agreements. The question of whether those e-mails constitute a letter of engagement that substantially complies with 22 NYCRR 1215.1 is a question of fact which cannot be resolved on a motion to dismiss. Therefore, plaintiff's fourth cause of action against Credno will not be dismissed.

Defendant Credno next argues that the fifth cause of action fails to state a claim for breach of contract because the alleged business agreements between Credno and Gordon are unenforceable since they violate DR 5-104 (22 NYCRR 1200.33), which requires attorneys to follow certain rules when entering into agreements with clients. Here, Gordon alleges that he entered into two agreements with Credno: (1) the indemnification agreement and (2) the agreement to start a new business venture. Defendant contends that plaintiff cannot allege that he complied with DR 5-104 because the agreements plainly create "differing interests" between attorney and client. Moreover, defendant argues that Gordon fails

to allege that he met his obligations under DR 5-104 by showing that the agreements were fair and reasonable to Credno and fully disclosed in writing to him, that Gordon encouraged Credno to obtain the advice of independent counsel, and/or that Credno signed a written agreement confirming his informed consent.

DR 5-104, like current Rule 1.8 (a), imposed certain requirements upon attorneys who enter into business transactions with their clients, but only "if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client." DR 5-104 (A). The rule applied "where an attorney enters into a business relationship with a client while also acting as the client's attorney with respect to the relationship." *Beltrone v General Schuyler & Co.*, 252 AD2d 640, 641 (3d Dept 1998). However, the Complaint does not allege, and Credno does not contend, that plaintiff was acting as Credno's attorney in relation either to the alleged agreement regarding their joint defense, or to the alleged agreement to enter into a business together. Accordingly, the fifth cause of action will also not be dismissed at this time.

Motion Sequence No. 002⁴

With respect to the claims against SkyLink USA for legal fees, which Gordon tries to recover under breach of contract (first cause

⁴ Defendant Credno, in his Memorandum of Law, joins in and incorporates the arguments set forth in SkyLink USA's Memorandum of Law seeking dismissal of the sixth through ninth causes of action. Credno also joins SkyLink USA's application for attorneys' fees upon dismissal of the derivative claims pursuant to Wyoming law.

of action), unjust enrichment (second cause of action), or quantum meruit (third cause of action), defendants assert that these claims fail as a matter of law.

Defendants argue that Gordon has the burden of proving the existence and terms of the attorney-client agreement, that the agreement was fair, reasonable and fully understood by the client and that the charges are supported by invoices and time records and are not excessive. Defendants further argue that Gordon has already received \$200,000.00 for his legal work and that it does not make sense that he would now seek compensation of an additional \$1.5 million when his services were terminated in 2005.

They contend that Gordon's claim that he generally worked more than 200 hours per month, and often more than 250 hours per month, is implausible and unsupported. To be sure, Gordon will have the burden of proof on these causes of action, and, in order to prevail on his breach of contract claim, he will need to show not only what hours he worked, but also that Babra authorized him to work more than 80 hours per month, such authorization having been required by plaintiff's employment contract. However, defendants' argument that plaintiff's claim is implausible is not a ground to dismiss the claim on a CPLR 3211 (a) (7) motion.

With regard to the sixth through ninth causes of action, the SkyLink defendants argue that these derivative claims are barred by

plaintiff's acknowledged failure to make a pre-litigation demand on the board of directors of SkyLink Wyoming; plaintiff lacks standing to raise the derivative claims because he is no longer a shareholder of SkyLink Wyoming; a necessary party, SkyLink Wyoming, has not been named; the derivative claims are time-barred; both the derivative and the personal claims are alleged against the wrong defendants; and the personal claims must be dismissed because they plead an injury only to SkyLink Wyoming.

In order to determine whether a shareholder can properly assert a derivative action on behalf of a corporation, the Court generally applies the law of the State where a corporation is incorporated. (See, e.g., *Hart v General Motors Corp.*, 129 AD2d 179, 182 [1st Dep't 1987]). However, whether a plaintiff has standing to maintain a derivative action is governed by New York law. (See *Pessin v Chris-Craft Indus.*, 181 AD2d 66, 71 (1st Dep't 1992)).

Defendants argue that plaintiff lacks standing to raise the derivative claims because he was not a shareholder of SkyLink Wyoming at the time that he commenced this action. (See *Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193 [1st Dept 2005]). The April 3, 2003 Shareholders Agreement, pursuant to which plaintiff purchased 300 shares of SkyLink Wyoming from nonparty Skylink Aviation, Inc. ("SkyLink Aviation"), provides that, "[a]t any time on and after two (2) years ... Skylink Aviation shall have the option to

repurchase" those shares for the sum of \$25,000. Defendants contend that, on March 3, 2005, Babra sent plaintiff a check for \$25,000, and a letter stating that Skylink Aviation was exercising its option, effective April 3, 2005. Plaintiff, on the other hand, states in his Affidavit that Babra sent him a photocopy of such a check, but not the actual check.

A motion to dismiss on the basis of documentary evidence may be granted only if such evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). Neither the copy of the face of a check, that is annexed as Exhibit C to the Affirmation of Adam B. Rowland, Esq. in Support of the Motion, nor the two letters addressed to plaintiff by Babra, dated March 3, 2005, and April 20, 2005, definitively disprove plaintiff's statement that he was sent only a copy of a check, and that accordingly, he remains a shareholder of SkyLink Wyoming to this day.

With regard to plaintiff's failure to make a demand upon the board of directors of SkyLink Wyoming, Wyoming Rules of Civil Procedure (W.R.C.P.) 23.1 provides, in relevant part, that a complaint in a derivative action "shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority ... and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Defendants point out that in 1997,

Wyoming adopted the Model Business Corporation Act, which, insofar as is relevant here, abolishes the futility exception to the requirement that a demand on a corporate board must be made before a derivative action may be brought (see Wyo. Stat. Ann. § 17-16-742 [a] ["No shareholder may commence a derivative proceeding until: (i) A written demand has been made upon the corporation to take suitable action;"]), and that *Mutual of Omaha Ins. Co. v Blury-Losolla* (952 P2d 1117, 1120 [Wyo 1998]) holds that a procedural rule may not abridge any rights guaranteed by substantive law. Nonetheless, in *Woods v Wells Fargo Bank Wyoming* (90 P3d 724 [Wyo 2004]), the Wyoming District Court had granted defendants summary judgment on the grounds that the complaint of the plaintiff Steven Woods did not contain a verified allegation of demand on the company which was alleged to have caused damage to the plaintiff, and that the plaintiff could not fairly represent the interests of the other shareholders. The Supreme Court of Wyoming affirmed on the basis of the second ground given by the district court, stating that "even if the formal pleading requirement were excused as futile[,] there were multiple reasons why Woods could not fairly represent the other shareholders. *Id.* at 735.

This statement unambiguously implies that the failure to plead a pre-litigation demand can be excused where such a demand would have been futile. Thus, notwithstanding Wyoming's adoption of the Model Act, Wyoming appears to continue to give effect to the

futility exception that appears in W.R.C.P. 23.1, which the *Woods* Court quoted in a footnote, pointing out its similarity to Rule 23.1 of the Federal Rules of Civil Procedure, which also contains a futility exception. See *id.* at 734-735, n 4. Paragraph 84 of Gordon's Complaint ("Since SkyLink Wyoming is currently under the control, and improperly so, of the perpetrators of the foregoing fraudulent, deceptive, wrongful and self-serving actions, it would be futile to demand that the officers of SkyLink Wyoming undertake this action.") alleges the futility of a demand. Accordingly, plaintiff may raise the derivative causes of action, despite having made no demand upon SkyLink Wyoming.

However, those branches of the sixth, eighth, and ninth causes of action which allege fraud and breach of fiduciary duty on behalf of SkyLink Wyoming, are time-barred. CPLR 202 provides that "[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued." "When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529 [1999]; see also *Veritas Capital Mgt., LLC v Campbell*, 82 AD3d 529 [1st Dept 2011], lv disp 17 NY3d 778 [2011]). Plaintiff acknowledges that, with regard to the derivative claims in the Complaint, he steps into the shoes of SkyLink Wyoming, a resident of Wyoming. Accordingly,

Wyoming law, which prescribes a four-year limitations period for claims of fraud, as well as for claims of breach of fiduciary duty (see Wyo. Stats, Ann. § 1-3-105 [a] [iv]), controls.

The stock transfers of which plaintiff complains took place in December 2003. This action was commenced in 2009. While Wyoming law provides that "the statute of limitations is not triggered until the plaintiff knows or has reason to know of the existence of a cause of action" (*James v Montoya*, 963 P2d 993, 995 [Wyo 1998]), plaintiff acknowledges that he was aware of the stock transfers at the time that they occurred. Accordingly, the derivative claims alleging fraud and breach of fiduciary duty must be dismissed.

Ordinarily, a corporation on behalf of which a derivative claim is raised should be joined as a defendant. *Tobias v Tobias*, 192 AD2d 438 (1st Dept 1993). Here, a broad arbitration clause in the April 3, 2003 Shareholders Agreement, to which both plaintiff and SkyLink Wyoming are parties, bars plaintiff from joining SkyLink Wyoming as a party to this action. The purpose of the compulsory joinder rule (CPLR 1001) "is both to prevent duplicative litigation and to protect the rights of persons who may be adversely affected by the outcome" of a case. *Buechel v Bain*, 275 AD2d 65, 72 (1st Dept 2000), *affd* 97 NY2d 295 (2001), *cert denied* 535 US 1096 (2002). Here, although "an effective judgment may be rendered in the absence of" SkyLink Wyoming (CPLR 1001 [b] [5]), "plaintiff has another effective remedy" (CPLR 1001 [b] [1]),

inasmuch as the matters alleged in the seventh cause of action are also the subject of the arbitration that plaintiff has commenced against Arbib and Babra, among others. Consequently, and in order to avoid the possibility of inconsistent outcomes, the seventh cause of action is dismissed.

Wyoming law allows an award of attorneys' fees to a defendant in a derivative action, if the court "finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose." Wyo. Stat. Ann. § 17-16-746 (a) (ii). In *Mueller v Zimmer* (173 P3d 361 [Wyo 2007]), where the court had dismissed a number of derivative claims, it awarded attorneys' fees only for the defense of a frivolous claim. Here, three of the derivative claims are being dismissed solely because Wyoming law, rather than New York, provides the governing statutes of limitations, and the fourth derivative claim is being dismissed because plaintiff has already commenced an arbitration proceeding against SkyLink Wyoming (amongst others), which he cannot join as a party to this action. This Court does not find that plaintiff's derivative claims were frivolous, or were "commenced or maintained without reasonable cause or for an improper purpose." Accordingly, this Court declines to award attorneys' fees to defendants.

Citing *Abrams v Donati* (66 NY2d 951 [1985]), defendants argue that those branches of the sixth, eighth, and ninth causes of action that are brought by Gordon in his individual capacity must

be dismissed, because any harm suffered by plaintiff came about through, and as a direct result of, the harm allegedly suffered by SkyLink Wyoming. However, these causes of action allege not only that defendants effected the sale of SkyLink USA shares with no benefit flowing to either SkyLink USA, or to SkyLink Wyoming, but also that the transactions were structured for the sole or primary benefit of SkyLink Canada, a minority shareholder of SkyLink Wyoming, and of its sole owners, Arbib and Babra.

Thus, these causes of action allege not only that SkyLink Wyoming was defrauded, but also that the transactions benefitted one shareholder of SkyLink Wyoming at the expense of plaintiff and other shareholders. The latter claim is personal to plaintiff, and is governed by New York statutes of limitations, i.e., six years for the causes of action alleging fraud (CPLR 213), and six years for the cause of action alleging breach of fiduciary duty, inasmuch as that claim primarily seeks equitable relief. (See *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]).

The causes of action alleging fraud are pled with sufficient specificity. The two allegedly fraudulent sales of SkyLink USA shares are at issue in those causes of action, and the defendants against whom those causes of action are alleged are claimed to have authorized and effectuated those sales.

This Court also rejects defendants' argument that the sixth through the ninth causes of action name the wrong defendants. The Complaint alleges that Credno, SkyLink USA, SportsFlight, Moss, Sehmi, Kalsi, Heisserman, and Rogers, all of whom are named as defendants, caused SkyLink USA to sell shares of SkyLink USA to SportsFlight and to Sehmi, without any consideration being paid to either SkyLink USA or to SkyLink Wyoming.

Finally, the 002 defendants contend that the Complaint alleges no basis for jurisdiction over Kalsi, who is alleged to be a citizen of Canada, or over Sehmi, who is alleged to be a citizen of Maryland, and that plaintiff has failed to serve process upon Sehmi. Plaintiff does not oppose dismissal of the Complaint as to Sehmi. With regard to Kalsi, plaintiff contends that this Court may exercise personal jurisdiction over him pursuant to CPLR 302 (a) (3) (ii), which provides for personal jurisdiction over a non-resident defendant who "commits a tortious act without the state causing injury to person or property within the state ... if he ... expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." The Complaint alleges that Kalsi participated in effecting the stock transfers discussed above.

However, citing *McGowan v Smith* (52 NY2d 268 [1981]), the 002 defendants argue that plaintiff's residence in New York does not suffice to establish an "injury ... within the state." In *McGowan*,

of course, the complaint had alleged an "injury to person," which had occurred in Canada. Here, by contrast, the economic injury complained of occurred within the state, inasmuch as plaintiff is a resident of the state. See *Global Fin. Corp. v Triarc Corp.*, *supra*. Those who are alleged to have effected the stock transfers should certainly have expected those acts to have consequences injurious to plaintiff; that is, in New York. Finally, the Complaint, as amplified by plaintiff's Affidavit, shows that there may be jurisdictional facts to support the allegation that Kalsi personally derived, and continues to derive, substantial revenue from international commerce, inasmuch as he is alleged to be involved, in association with SkyLink Canada, in supplying air support services in the Middle East.

Accordingly, the motions are granted only to the extent of dismissing the Complaint as to defendant Davinder Sehmi, dismissing the seventh cause of action in its entirety and dismissing those portions of the sixth, eighth and ninth causes of action alleging derivative claims.

The motion is otherwise denied and the remaining causes of action are severed and continued.

The defendants are directed to serve Answers to the severed claims in the Complaint within thirty days of notice of the e-filing of this Decision.

All parties or their counsel, shall appear for a preliminary conference in IA Part 39, 60 Centre Street - Room 208 on March 20, 2012 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: January 9, 2012



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.