

Yorktown Distribs., Inc. v Schlecker

2013 NY Slip Op 31015(U)

May 6, 2013

Supreme Court, Suffolk County

Docket Number: 4461-2005

Judge: Emily Pines

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SHORT FORM ORDER

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

*Present:*HON. EMILY PINES

J. S. C.

Motion Dates: 7/02/12; 12/18/12 &
12/12/12

Submit Date: 12/18/2012

Motion No.: 008 MOTD

009 MOTD

010 MOTD

[] Final

[x] Non Final

_____ X
YORKTOWN DISTRIBUTORS, INC. ,and
PHILIP MASCIA, LORETTA MASCIA,
Plaintiffs,

Action #1
Index # 4461-2005Attorney for H & S Schlecker
Feeny & Associates, PLLC
503 Route #111
Hauppauge, New York 11778

-against-

ROSEMARIE SCHLECKER, individually and as
ADMINISTRATOR OF THE ESTATE OF HOWARD
SCHLECKER,
Defendants.

Attorney for Yorktown
Sarisohn Law Partners, LLP
350 Veterans Mem. Highway
Commack, New York 11725Attorney for L & P Mascia
John G. Poli, III, PC
200 Laurel Avenue
Northport, New York 11768

_____ X
ROSEMARIE SCHLECKER, individually and as
ADMINISTRATOR OF THE ESTATE OF HOWARD
SCHLECKER,
Plaintiffs,

Action #2
Index # 25982-2009

-against-

YORKTOWN DISTRIBUTORS, INC., and PHILIP
MASCIA, LORETTA MASCIA, KEVIN NORRIS AND
ROSEANNE BERTALINI DOLAN
Defendants.

_____ X

ORDERED that the motion for summary judgment (Mot. Seq. 008) by defendants in Action 2, Kevin Norris and Rose Ann Bertalini Dolan, the cross-motion for summary judgment (Mot. Seq. 009) by defendant in Action 1 and plaintiff in

Action 2, Rosemarie Schlecker, individually and as Administrator of the Estate of Howard Schlecker, and the motion (Mot. Seq. 010) by plaintiffs in Action 1 and defendants in Action 2, Philip Mascia and Loretta Mascia, are decided as set forth herein.

Factual and Procedural Background

In 1987, plaintiff in Action 1 and defendant in Action 2, Yorktown Distributors, Inc. d/b/a Yorktown Electrical & Lighting (hereinafter Yorktown), purchased a life insurance policy from National Life Insurance Company (“National”) in the amount of \$1,000,000 covering the life of Howard Schlecker, one of its employees. Yorktown was the owner and named primary beneficiary of such policy. Thereafter, following a cancer diagnosis, Howard Schlecker became disabled and was no longer employed by Yorktown. On August 25, 1989, Yorktown and Howard Schlecker entered into an agreement (hereinafter 1989 Agreement), which addressed the life insurance policy. The 1989 Agreement provides, in relevant part:

WHEREAS, there are differences that presently exist between YORKTOWN . . . and HOWARD SCHLECKER, one of which is who should be the beneficiary with regard to the above referred to insurance policy, and

WHEREAS, the parties would like to settle their differences solely with respect to the above referred to policy of insurance.

NOW, THEREFORE, it is agreed by and between the parties that:

1. That YORKTOWN . . . shall be the beneficiary as to one-half (1/2) of the proceeds of said policy. ROSEMARIE SCHLECKER shall be the beneficiary as to the other one-half (1/2) of the proceeds of the insurance policy.

3. That YORKTOWN . . . shall continue to pay the premium for said policy.

5. In the event of the *sale of a majority of stock or sale of the business known as YORKTOWN . . .* Howard Schlecker shall be given immediate written notice thereof and have the immediate right to make premium payments for the insurance policy, in which event, ROSEMARIE SCHLECKER shall become sole beneficiary upon [sic] the insurance policy. (emphasis supplied).

Due to Howard Schlecker's disability, Yorktown received a "waiver of premiums" from National for the premium payments on the life insurance policy, conditioned upon Howard Schlecker remaining disabled. Thereafter, in the early 1990's, National rescinded this "waiver of premium" and Yorktown refused to file the change of beneficiary status, as required pursuant to paragraph 2 the 1989 Agreement, until Howard Schlecker provided proof of his continued disability.

In 1995, the Schleckers commenced an action in this Court against Yorktown and National under Index No. 18939/95 (hereinafter 1995 Action), in which they sought a declaration of their rights under the 1989 Agreement.

On February 8, 2001, plaintiff in Action 1 and defendant in Action 2, Loretta Mascia, as Seller, entered into a Stock Purchase Agreement with defendants in Action 2, Roseann Dolan and Kevin Norris, as Purchaser (hereinafter SPA). The SPA recites, among other things, that Loretta was the sole stockholder of Yorktown. The SPA states, in relevant part:

WHEREAS, the Seller desires to sell the Shares of the Corporation and the Purchaser desires to buy such shares pursuant to the terms and conditions contained herein.

NOW, THEREFORE, in consideration of the mutual

promises, undertakings, warranties and representations and covenants herein made, and other good and valuable consideration, the parties agree as follows:

1. **Agreement to Sell.** The Seller will sell fifty (50%) percent of her Shares to the Purchaser (15 shares each), and each Purchaser will purchase the Shares subject to the provisions of this Agreement . . .

2. **Option to Purchase.** The Purchaser shall have a nonassignable and nontransferable Option to Purchase the Seller's "Remaining Shares" (30 shares) of the Corporation . . . upon the happening of one or more of the following events ("Option Event"), whichever occurs first:

- i. The date on which the Corporation is unconditionally released from any restriction imposed on the sale of a majority of the capital stock of the Corporation pursuant to a written agreement between the Corporation and Howard Schlecker dated August 25, 1989 . . . or the expiration of ten (10) years from the closing date;
- ii. The "Option Price" for these Remaining Shares shall be ten (\$10) dollars and a one-year extension of the Consulting Agreement described in hereinafter in Paragraph 4.28;
- iii. Provided the Purchaser is in full compliance with all of their obligations under this Agreement . . . the Seller covenants and agrees to provide the Purchaser with a proxy for the Remaining Shares, which shall be revocable only upon an uncured default by the Purchaser under this Agreement or the collateral

agreements executed by Purchase in connection herewith;

- iv. The Remaining Shares shall be transferred and delivered to Purchaser from escrow pursuant to Paragraph 3.6 herein . . .

* * *

3.5 At the closing, the following adjustments shall be made: rents, security deposits, insurance premiums, taxes, electricity, gas, fuel, water, interest on loans or other liens, and the lease agreement on the 1998 Lexus automobile . . . The parties shall also adjust for accounts receivable calculated on a net basis . . .

3.6 At the closing, Seller shall transfer and deliver in escrow with the Seller's attorney (the "Escrowee"), a certificate or certificates representing the Shares being transferred to the Purchaser with a stock power executed in blank by Purchaser. Seller shall also deliver in escrow the Remaining Shares described in Paragraph 2 above.

* * *

4.25 **Resignation of Seller.** On the closing date, the Seller and Philip J. Mascia ("Mascia") shall tender their resignations as an employees, officers and directors of the Corporation and from all committees to which they may have been appointed. Contemporaneously with the Seller's resignation, she shall nominate and elect the Purchaser as the new officers and directors of the Corporation.

* * *

4.27 **Life Insurance Policy.** The Corporation is currently the owner of an insurance policy held by National Life

Insurance Company of Vermont, Policy No. 21026577, insuring the life of Howard Schlecker, a former officer and employee of the Corporation.

Nevertheless, the Corporation acknowledges that the Seller is the beneficial owner of this policy and is entitled to all of the benefits associated with the ownership of same. Accordingly, the Corporation hereby waives, release and relinquishes all right, title and interest in and to the aforesaid policy to Seller or her designee. Furthermore, the Corporation shall cooperate in the execution of any and all documents necessary to effectuate an assignment or other transfer of this policy pursuant to this Agreement.

The SPA further provides that the purchase price for Loretta Mascia's stock in Yorktown was \$525,000.

The closing of the transaction occurred on February 26, 2001, at which time an Irrevocable Proxy dated February 26, 2001, was executed by Loretta Mascia giving Norris and Dolan her proxy with regard to the remaining 30 shares of stock in Yorktown held in escrow pursuant to the SPA. At that time, Yorktown entered into a Consulting Agreement with Philip Mascia for a term of ten years with a minimum monthly payment to Philip Mascia of \$1,517.00. It is undisputed that at that time, neither Yorktown, the Mascias, Norris nor Dolan notified the Schleckers of the transaction.

On January 29, 2002, this Court (Floyd, J.) issued a judgment in the 1995 Action which states, in relevant part:

ADJUDGED, that the plaintiffs Howard/Rosemarie Schlecker have a duty of good faith and fair dealing within his contract with Yorktown dated August 25, 1989; and it is further

ADJUDGED, that if plaintiff, HOWARD SCHLECKER, fails to provide information regarding his "continued disability" and/or fails to submit to a medical examination within ninety

(90) days . . . National Life . . . is not required to waive any premium(s) that are due and owing under the terms of its life insurance policy no. 21026578 from June 20, 1992 . . . and it is further

ADJUDGED, that the defendant Yorktown is contractually bound to pay the premiums due on the aforesaid policy from June 20, 1992 to present, if any are in arrears, and to continue into the future, but such payments are contingent upon a finding by defendant National Life that plaintiff Howard Schlecker is not disabled within the meaning of the aforesaid life insurance policy; and it is further

ADJUDGED, that the plaintiff Howard Schlecker is required to cooperate in good faith and provide medical and other information to defendant National Life regarding his “continued disability”; and it is further

ADJUDGED, that plaintiff Howard Schlecker and Rosemarie Schlecker will have been deemed to have breached the implied covenant of good faith and fair dealing within the confines of plaintiff’s contract with Yorktown to provide a \$1,000,000.00 life insurance policy if plaintiff Howard Schlecker fails to provide the necessary information for National Life to make an informed decision regarding waiver of premiums. Such failure of plaintiff Howard Schlecker to provide this necessary information will then relieve defendant Yorktown of its obligation to continue to provide premiums and subject plaintiffs Howard Schlecker and Rosemarie Schlecker to damages including the loss of past premiums paid; and it is further

ADJUDGED, that the defendant Yorktown and plaintiff Rosemarie Schlecker are co-beneficiaries under the aforesaid life insurance policy and defendants are directed to forthwith effectuate said declaration of beneficiaries upon compliance herein.

On February 17, 2005, Yorktown commenced an action in this Court against the Schleckers under Index No. 4461/05 (hereinafter 2005 Action), to enforce the judgment in the 1995 Action. Yorktown sought reimbursement of all the premiums it paid on the life insurance policy due to Howard Schlecker's alleged failure to provide information regarding his continuing disability to National Life, as required by the 1989 Agreement and declared in the judgment in the 1995 Action. The Mascias were subsequently added as plaintiffs in the 2005 Action. Schlecker interposed counterclaims in the 2005 Action sounding in breach of contract (the 1989 Agreement), fraudulent concealment, material misrepresentation, equitable estoppel, violation of General Business Law § 349, piercing the corporate veil, violations of Insurance Law § 3205, and unjust enrichment.

Howard Schlecker passed away on January 29, 2007.

On July 27, 2007, National Life commenced an action in this Court under Index No. 20256/07, against Yorktown and Rosemarie Schlecker (hereinafter 2007 Action). On September 16, 2008, National Life obtained a judgment in the 2007 Action that, among other things, (1) directed it to pay into court the sum of \$928,604.36, representing the proceeds of the policy insuring Howard Schlecker's life, (2) upon payment into court, releasing and discharging National Life from any and all claims relating to or arising out of any obligation under the policy.

On July 9, 2009, Rosemarie Schlecker commenced an action in this Court under Index No. 25982/09 against Yorktown, seeking a final determination of the rights of the parties regarding the proceeds of the policy and distribution of the monies in custody of the Treasurer and for damages for breach of the 1989 Agreement (hereinafter 2009 Action). Rosemarie Schlecker alleged, among other things, that Yorktown took loans against the policy and used the funds to pay the premiums thereby reducing the policy proceeds. The Mascias and Norris and Dolan were subsequently added as defendants in the 2009 Action. In the 2009 Action, Schlecker asserts causes of action for breach of contract (the 1989 Agreement), fraudulent concealment, material misrepresentation, equitable estoppel, violation of

General Business Law § 349, piercing the corporate veil, violations of Insurance Law § 3205, and unjust enrichment. These claims essentially duplicate the counterclaims asserted by Schlecker in the 2005 Action.

By order dated September 13, 2010, this Court (Pines, J.), among other things, denied Yorktown's cross-motion for summary judgment dismissing all counterclaims as asserted against Yorktown in the 2005 Action. In its decision, this Court stated, in relevant part:

In a case involving an agreement for the "sale of stock", where the seller sought specific performance, despite the fact that the major asset of the business had been destroyed and rendered worthless, the Court of Appeals upheld the Appellate Division's granting of relief to the seller. However, the Court disagreed with both lower Courts' characterization of the transaction as a "sale of a business" as opposed to a sale of stock. In so stating, the Court of Appeals opined that "(t)he well settled rule is that 'ownership of capital stock is by no means identical with or equivalent to ownership of corporate property". **In the Matter of Fontana D'Oro Foods, Inc., 65 NY2d 886, 493 NYS2d 300, 482 NE2d 1216 (1985).** In so stating, the Court warned that given the form of the transaction, which was in fact a stock transfer, it mattered little whether the intent of the parties was really to transfer control of the business enterprise. **Id.**

Applying the above cited rules of law to the various issues before the Court, the Court finds as follows. The papers raise more questions that [sic] they answer. While Yorktown has agreed to dismissal of its two causes of action against Schlecker in the 2005 action due to its lack of interest in the insurance proceeds, it commenced the action, without such apparent interest. While the 1989 agreement between Howard Schlecker and Yorktown requires immediate written notification to Schlecker upon a sale of the majority of the stock or the business, it is unclear whether the 2001 Stock Purchase Agreement came within the ambit of the 1989 clause. While

the Court agrees with counsel for Yorktown that there was not a “sale of the business” under the Court of Appeals ruling, there may well have been sale of the majority of the shares.

In addition . . . it is still unclear whether the Schleckers did or did not comply with the requirement to turn over proof of Mr. Schlecker’s continued disability and/or made himself available for examination. It also remains unclear whether the continued failure to change the names of necessary parties with the State, the commencement of actions in the name of Yorktown, and the correspondence on behalf of Yorktown that the majority of the stock had not been sold constituted an attempt to conceal the true status of stock ownership of Yorktown from the Schleckers.

Under all of the circumstances, the Court finds that Rosemarie Schlecker has raised issues of fact in opposition of Yorktown’s motion for Summary Judgment, dismissing all claims against such entity and therefore, denies that motion. In addition, based on those same claims, the Court exercises its discretion in consolidating the 2005 and 2009 actions under Index # 044612-05, the actions involving the same parties, and the same issues. Accordingly, Yorktown’s other cross-motion to dismiss the 2005 counterclaims under 3211 (a)(4) is denied.

By order dated May 6, 2011, this Court (Pines, J.) denied Schlecker’s motion to reargue Yorktown’s cross-motion for summary judgment stating, in relevant part:

The motion to reargue takes issue with the Court’s interpretation and application of a Court of Appeals case concerning whether the sale of stock necessarily constitutes the sale of a business.

* * *

Rosemarie Schlecker has not convinced the Court that it misapprehended either the law or the facts in rendering its prior determination. The Court states that the Court of Appeals, in **Matter**

of **Fontana D'Oro Foods, Inc**, 65 NY2d 886, 493 NYS2d 300, 482 NE2d 1216 [1985] required the Court to look to the form of the transaction. That is what the Court did in the case at bar, in reaching its conclusion that there was no sale of the business. However, the Court did in no way preclude Rosemarie Schlecker from demonstrating that the stock purchase agreement came within the ambit of the 1989 clause.

Motion for Partial Summary Judgment by Yorktown, Norris and Dolan

In Mot. Seq. 008, Norris and Dolan move for summary judgment dismissing the 2009 Action and the counterclaims in the 2005 Action as asserted against them in their individual capacities, and Yorktown moves for summary judgment dismissing the 2009 Action as asserted against it as duplicative of the counterclaims asserted against it in the 2005 Action. In an affidavit in support of the motion, Dolan avers that she has been Secretary/Treasurer of Yorktown since 2001. Dolan states that she and Norris purchased 30 shares (15 shares each) of the 60 issued and outstanding shares in Yorktown from Loretta Mascia pursuant to the SPA. The remaining 30 shares were held in escrow by Mascia's attorney until the balance of the sale price was paid. Dolan claims that she and Norris did not know about the existence of the 1989 Agreement between Yorktown and Howard Schlecker when they purchased the shares in 2001. Thus, Dolan contends that she could not have violated the 1989 Agreement when she purchased shares in Yorktown because she was unaware of its existence. Dolan states that she never made any misrepresentations, never committed and fraudulent acts, and never conspired to conceal anything from anyone. Norris also submits an affidavit in which he adopts the statements contained in Dolan's affidavit. Counsel contends that Norris and Dolan have no interest in the proceeds of the life insurance policy and that the only parties in interest are Schlecker and the Mascias. Thus, counsel argues that Norris and Dolan should be dropped as defendants in the 2009 Action as they are unnecessary parties. Counsel cites to Schlecker's deposition testimony where she testified that she never met Norris and Dolan, never had any communication with them, and never received anything in

writing from Norris and/or Dolan that would impose liability on them. Counsel alleges that Schlecker admitted at her deposition that she has no first-hand knowledge of any acts committed by Norris and/or Dolan. Schlecker also admitted that she did not know whether Norris and Dolan had an agreement with Mascia. Thus, counsel contends that the claims asserted against Norris and Dolan in the 2009 Action must be dismissed because there is no admissible evidence to support any of Schleckers claims as asserted against them. Additionally, counsel argues that once the 2009 Action as asserted against Norris and Dolan is dismissed, the remainder of the 2009 Action should also be dismissed because the remaining claims are duplicative of the counterclaims asserted by Schlecker against Yorktown and the Mascias in the 2005 Action.

Cross-Motion by Schlecker for Partial Summary Judgment

Schlecker opposes the motion for partial summary judgment by Norris, Dolan and Yorktown and cross-moves (Mot. Seq. 009) for partial summary judgment (1) on her breach of contract claim against Yorktown, (2) her claim to pierce Yorktown's corporate veil and impose liability for the breach of contract upon Norris, Dolan and the Mascias, (3) dismissing all claims as asserted against Schlecker, (4) vacating the judgment in the 1995 Action, (5) directing the Suffolk County Treasurer to release the funds being held to Schlecker, and (6) setting this matter down for an inquest on damages sustained by Schlecker above and beyond the amount held by the Suffolk County Treasurer. Schlecker contends, among other things, that the evidence, including the deposition testimony of the parties, demonstrates that the business of Yorktown and a majority of the stock in Yorktown were sold by Mascia to Norris and Dolan on February 26, 2001, pursuant to the SPA. Schlecker alleges that in drafting the SPA, it was the intent of the Mascias and Norris and Dolan to circumvent the 1989 Agreement between Yorktown and Howard Schlecker in order to deprive Howard Schlecker of his right under the 1989 Agreement to take over the life insurance policy and have Rosemarie Schlecker named as the sole beneficiary of the policy.

Rosemarie Schlecker argues that a review of the deposition testimony, the tax returns filed by the parties, and the terms of the SPA and other documents executed in connection therewith, demonstrates, as a matter of law, that Loretta Mascia sold all of the outstanding shares in Yorktown to Norris and Dolan, but failed to notify Howard Schlecker thereby breaching the 1989 Agreement. It is pointed out that pursuant to the SPA, the rights and powers associated with all 60 shares of stock in Yorktown were transferred to Norris and Dolan, even though 30 shares were held in escrow as security. Additionally, Norris admitted at his deposition that the purpose of entering into the SPA was so that he and Dolan “could buy the business.” Norris testified that upon closing, he and Dolan, as the new officers of Yorktown, signed a new lease for the building at which Yorktown was located, assumed the payments for electric, gas, water and insurance, and all of Yorktown’s fixtures, furniture, equipment and inventory were transferred to Norris and Dolan. Norris also admitted that he and Dolan each purchased 30 shares on February 26, 2001, but they only received 15 shares each at that time with the other 30 shares held in escrow. Nevertheless, the SPA gave he and Dolan all the voting rights associated with the 30 shares held in escrow.

Additionally, in support of her cross-motion, Schlecker provides copies of Yorktown’s corporate tax returns from 2001-2007. The Schedule K-1s filed by Yorktown with those tax returns indicate that Norris and Dolan each owned 50% of Yorktown’s stock during each of those tax years. Schlecker also provides copies of Norris’ and Dolan’s individual tax returns during that same time period, each of which reflects the same ownership interest in Yorktown (50%) as reported by Yorktown on the Schedule K-1s. Norris and Dolan have stipulated that each of Yorktown’s tax returns from 2001-2010 reflect that they were each 50% shareholders in Yorktown. Schlecker argues that the tax returns demonstrate that 100% of Yorktown’s shares were sold to Norris and Dolan in 2001, and that Yorktown, Norris and Dolan are equitably estopped from now taking a position that is contrary to that reflected on the tax returns.

Schlecker also argues that the argument that only 30 of the 60 outstanding

Shares in Yorktown were sold to Norris and Dolan in 2001 is meritless because even though 30 shares were held in escrow, Loretta Mascia did not retain any of the rights and liabilities associated with those 30 shares, including voting rights and the right to receive dividends based on Yorktown's profits. Schlecker contends that the "Option to Purchase" the 30 shares held in escrow in paragraph 2 of the SPA is a sham since the option price was only \$10.00 and a one-year extension of Philip Mascia's consulting agreement with Yorktown. Schlecker argues that the transaction was actually a sale of all the stock, assets and liabilities of Yorktown for a set price and Norris and Dolan executed a promissory note in the amount of \$450,000 in favor of the Mascias secured by Yorktown's assets and the 30 shares held in escrow. Thus, Schlecker contends that the evidence demonstrates, as a matter of law, that there was a sale of a majority of Yorktown's stock and a sale of the business of Yorktown to Norris and Dolan in 2001. As it is undisputed that Howard Schlecker was not given immediate written notification of the transaction, Schlecker argues that she is entitled to summary judgment on her breach of contract claim.

Schlecker also argues that the foregoing demonstrates, as a matter of law, that Yorktown, the Mascias, and Norris and Dolan fraudulently concealed the 2001 transaction from the Schleckers and, in a 2001 letter from counsel for Yorktown and the Mascias, misrepresented to the Schleckers that there had not been a sale of a majority of the stock since "only fifty (50%) per cent of the capital stock of Yorktown was sold by Loretta Mascia on February 26, 2001. Therefore, since a "majority" (i.e. 51% or more) of the capital stock of Yorktown has not been sold, the National Life Insurance Policy remains unaffected by this provision of the August 25, 1989 agreement between Yorktown, Rosemarie Schlecker and Howard Schlecker."

Schlecker also contends that the foregoing demonstrates, as a matter of law, that the Mascias, Norris and Dolan exercised complete dominion and control over Yorktown and abused the privilege of doing business in the corporate form. She claims that the evidence shows that the Mascias, Norris and Dolan acted in concert to conceal, misrepresent and deprive the Schleckers of their rights to the life insurance policy under the 1989 Agreement.

In opposition to the motion by Norris and Dolan, Schlecker argues that the fact that she could not testify at her deposition about specific acts by Norris and Dolan is not a basis to dismiss the complaint as asserted against them because the documentary evidence supports Schlecker's claims against the individuals.

In opposition to Schlecker's cross-motion, Yorktown/Norris/Dolan argue, among other things, that there was no breach of the 1989 Agreement because Rosemarie Schlecker cross-claimed in a pleading dated September 14, 2007, served in the 2007 Action, that she was entitled to the proceeds of the insurance policy because Yorktown sold the business with giving notice to Howard Schlecker. Yorktown claims that this demonstrates that Schlecker knew of the alleged sale of Yorktown in 2007, if not earlier, and therefore "had the contractual notice required by the 1989 [a]greement." Additionally, Yorktown contends that in 2006 it offered the Schleckers the opportunity to assume ownership of the life insurance policy but they never accepted. Thus, Yorktown, Norris and Dolan argue that they do not bear any responsibility for Schlecker's failure to assume ownership of the policy. Yorktown also argues that the doctrine of law of the case precludes Schlecker from re-litigating the issue of whether the business of Yorktown was sold in 2001 to Norris and Dolan. Yorktown claims that this Court, by stating in its prior order dated September 13, 2010, that "there was not a 'sale of the business' under the Court of Appeals ruling", resolved that issue in its favor. Notably, however, Yorktown/Norris/Dolan do not respond, in any manner, to Schlecker's argument that the tax returns filed by Yorktown/Norris/Dolan and the deposition testimony (all of which was disclosed after the Court's order dated September 13, 2010) demonstrate, as a matter of law, that Mascia sold all outstanding shares in Yorktown to Norris and Dolan in 2001 pursuant to the SPA, and that the parties are equitably estopped from now taking a position that is contrary to that taken on the tax returns.

Motion to Dismiss by Philip Mascia and Loretta Mascia

In Mot. Seq. 010, Philip Mascia and Loretta Mascia move, pursuant to CPLR

3211 to dismiss the affirmative defenses and counterclaims asserted by Schlecker in the 2005 Action. In support of their motion, the Mascias argue, among other things, that the doctrine of law of the case precludes Schlecker from re-litigating the issue of whether the business of Yorktown was sold in 2001 to Norris and Dolan. The Mascias also contend that the Court should find, as a matter of law, that a majority of Yorktown's stock was not sold to Norris and Dolan pursuant to the SPA because the SPA, on its face, indicates that only 50% of Yorktown's stock was being sold. Mascia points out that the remaining 50% of Yorktown's stock was subject to an "Option to Purchase" contained in the SPA, which option was exercised by Norris and Dolan in February 2011. Thus, the Mascias argue that because the SPA is clear and unambiguous, the Court should not consider any extrinsic or parol evidence. Notably, the Mascias do not respond to Schlecker's argument that the tax returns filed by Yorktown/Norris/Dolan and the deposition testimony demonstrate, as a matter of law, that Mascia sold all outstanding shares in Yorktown to Norris and Dolan in 2001 pursuant to the SPA, and that the parties are equitably estopped from now taking a position that is contrary to that taken on the tax returns. The Mascias contend that there was no material misrepresentation or fraud by Yorktown when its former counsel advised the Schleckers' former counsel in December 2001 in writing that a majority of Yorktown's stock had not been sold pursuant to the SPA. They also argue that Schlecker's separate cause of action for fraud cannot stand since the alleged fraud relates solely to an alleged breach of the 1989 Agreement.

In opposition/reply, Schlecker argues, among other things, that absent from the papers submitted in opposition to Schlecker's motion is any mention of the issue of the tax returns filed by Yorktown, Norris, Dolan, reflecting that Norris and Dolan were the sole shareholders of Yorktown beginning in 2001, and that they each owned 50% of Yorktown's stock. Schlecker also contends that the SPA is ambiguous regarding the amount of Yorktown stock sold since Mascia gave Norris and Dolan an irrevocable proxy with regard to the shares held in escrow. According to Schlecker, because she is entitled to summary judgement on her claim for breach of the 1989 Agreement, the judgment entered in the 1995 Action requiring the Schleckers to cooperate with National Life should be vacated, and the Mascias claims

in the 2005 Action that Schlecker failed to cooperate in accordance with that judgment should be dismissed, because the actions of the Schleckers following Yorktown's breach of the 1989 Agreement are irrelevant. Schlecker asks this Court, among other things, to set this matter down for an inquest as to the value of the National Life policy at issue had Yorktown paid the premiums as required and not borrowed from therefrom, thereby depleting its value. Schlecker also contends that the law of the case doctrine does not preclude her from seeking summary judgment on the ground that the SPA constituted a sale of the business. Schlecker argues that she did not have a full and fair opportunity to litigate that issue because discovery was not complete as she had not been provided with a complete copy of the SPA or tax returns, and depositions had not yet been held. Additionally, in her opposition/reply, Schlecker withdraws her claims pursuant to General Business Law § 349 and Insurance Law § 3205. Schlecker also concedes that if the Court dismisses her claims against Norris and Dolan in the 2009 Action, then the remaining claims in the 2009 Action can be dismissed as they are duplicative of the counterclaims in the 2005 Action.

Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). “[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant” (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

Breach of Contract

The elements of a cause of action for breach of contract are (1) the existence of a contract between plaintiff and defendant, (2) performance by the plaintiff, (3) defendant's failure to perform, and (4) damages resulting from such failure to perform (see *Furia v. Furia*, 116 AD2d 694 [2d Dept. 1986]).

Here, Schlecker has made a prima facie showing of entitlement to judgment as a matter of law on her claim for breach of contract against Yorktown. As set forth above, Schlecker claims, among other things, that Yorktown breached the 1989 Agreement with Howard Schlecker by failing to provide Howard Schlecker with immediate written notice of the sale of a majority of Yorktown's stock and the sale of the business of Yorktown pursuant to the SPA between Loretta Mascia and Norris and Dolan, which closed on February 26, 2001. The defendants argue, among other things, that the SPA clearly and unambiguously indicates that Loretta Mascia was only selling 50% of Yorktown's stock to Norris and Dolan at that time. However, in the tax returns filed by Yorktown from 2001-2007, and the Schedule K-1s filed therewith, Yorktown took the position that all of its stock was owned by Norris and Dolan. In their opposition papers, the defendants do not dispute that Yorktown reported on its corporate income tax returns that Norris and Dolan each owned 50% of Yorktown's stock during this time period. Dolan, in her capacity as secretary/treasurer of Yorktown, swore that the representations contained in Yorktown's tax returns were true. Moreover, Norris and Dolan have stipulated to the fact that the individual tax returns they filed during those same tax years reported that each of them owned 50% of Yorktown's stock, as reflected on the Schedule K-1s. Parties cannot, as a matter of policy, be permitted "to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]). Yorktown is bound by the representations that were made in its tax returns (see *Peterson v Neville*, 58 AD3d 489 [1st Dept 2009]). Accordingly, the Court finds that the defendants are estopped from denying that the transaction pursuant to the SPA did not constitute a sale of a majority of Yorktown's stock.

Inasmuch as it is undisputed that Howard Schlecker was not “given immediate written notice” of the sale of a majority of Yorktown’s stock, Schlecker is entitled to summary judgment on her counterclaim against Yorktown in the 2005 Action for breach of contract, and Schlecker is entitled to the full amount of the policy proceeds. Therefore, the Suffolk County Treasurer, upon presentation of a copy of this order with notice of entry, is directed to release the full amount of funds held under Suffolk County Index No. 20256/07, less any applicable fees, to Rosemarie Schlecker. Additionally, the issue of damages for breach of contract, if any, sustained by Schlecker above the amount of the policy proceeds held by the Suffolk County Treasurer, is referred to the trial to be held before this Court beginning on September 9, 2013. Contrary to Schlecker’s contention, due to the granting of such relief, vacatur of the judgment dated January 29, 2002, in the 1995 Action is not appropriate.

In light of the foregoing, the Court need not reach the issue of whether this Court’s prior order, and the application of the doctrine of law of the case, precludes Schlecker from claiming that the transaction pursuant to the SPA constituted a sale of Yorktown’s business.

Piercing Corporate Veil

However, the individual defendants are granted summary judgment dismissing all claims as asserted against them. In order to pierce the corporate veil, the proponent must demonstrate that (1) the owners exercised complete dominion over the corporation in respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the claimant which resulted in the petitioner’s injury (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135 [1993]). Even absent fraud, the corporate veil will be pierced to achieve equity, “[w]hen the corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator’s business instead of its own and can be called the other’s alter-ego” (*Matter of Island Seafood Co. v Golub Corp.*, 303 AD2d 892 [3d Dept 2003]),

quoting *Austin Powder Co. v McCullough*, 216 AD2d 825 [3d Dept 1995]).

Here, in opposition to the prima facie showing of the individual defendants, the plaintiff failed to raise a triable issue of fact that the individual defendants exercised complete domination and control over Yorktown and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice (*East Hampton Union Free School Dist v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]). Plaintiff failed to submit any evidence demonstrating a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, or use of corporate funds for personal use (see *D'Mel & Assocs. v Athco, Inc.*, — AD3d —, 2013 NY Slip Op 02324 [1st Dept 2013]). Accordingly, summary judgment is granted (1) to the Mascias dismissing the counterclaims as asserted against them in the 2005 Action, and (2) to Norris and Dolan dismissing all causes of action as asserted against them in the 2009 Action.

Remaining Claims in 2009 Action

In light of the dismissal of all causes of action as asserted against Norris and Dolan in the 2009 Action, Schlecker concedes that all remaining claims in the 2009 Action can be dismissed as duplicative of the counterclaims in the 2005 Action. Accordingly, all remaining claims in the 2009 Action are hereby dismissed.

Remaining Claims in 2005 Action

Conduct that amounts to active concealment can give rise to an action for fraud (see *Mancuso v Rubin*, 52 AD3d 580 [2d Dept 2008]). However, a fraud cause of action cannot be “premiered upon an alleged breach of contractual duties” (*Weinstein v Natalie Weinstein Design Assocs., Inc.*, 86 AD3d 641, 642 [2d Dept 2011], quoting *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 [2d Dept 2009]). A breach of contract does not give rise to a separate claim of negligent misrepresentation unless the acts alleged are based upon breaches of legal duties extraneous to and distinct from the contract (*RKB Enterprises Inc. v Ernst & Young*, 182 AD2d 971, 972 [3d Dept 1992]). “Recovery for unjust enrichment is barred by a valid and enforceable

contract” (*Whitman Realty Group, Inc. v. Galano*, 41 AD3d 590, 593 [2d Dept 2007]).

Here, Schlecker’s counterclaims sounding in fraudulent concealment and negligent misrepresentation are premised upon Yorktown’s breach of its contractual obligations. Similarly, Schlecker’s counterclaim for unjust enrichment is duplicative of her counterclaims to recover damages for breach of contract (see *Cooper, Bamundo, Hecht & Longworth v Kuczinski*, 14 AD3d 644, 645 [2d Dept 2005]). Accordingly, Yorktown is granted summary judgment dismissing the counterclaims for fraudulent concealment, negligent misrepresentation and unjust enrichment. As stated above, Schlecker has withdrawn her claims for violations of General Business Law § 349 and Insurance Law § 3205.

However, Schlecker has failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing the claims asserted against her in the 2005 Action by Yorktown. In that action, Yorktown seeks to enforce the declaratory judgment entered in the 1995 Action and reimbursement of all the premiums it paid on the life insurance policy due to Howard Schlecker’s alleged failure to provide information regarding his continuing disability to National Life, as required by the judgment in the 1995 Action. These claims must be resolved at trial. In accordance with the judgment in the 1995 Action, if it is proven at trial that Howard Schlecker failed to provide the necessary information for National Life to make an informed decision regarding waiver of premiums, then Yorktown will be relieved of its obligation to provide premiums and Schlecker will be subject to damages, if any, including the loss of past premiums paid.

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

Dated: May 6, 2013
Riverhead, New York



EMILY PINES
J. S. C.

Final
 Non Final