

Brody v 466 Broome St. of N.Y. City, Inc.

2013 NY Slip Op 32991(U)

November 21, 2013

Sup Ct, NY County

Docket Number: 102427/09

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK
Justice

PART 39

ROBERT BRODY
- v -
466 BROOME STREET

INDEX NO. 102427/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

Dated: 11/21/13

[Signature]
BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39

-----x
ROBERT BRODY,

Plaintiff,

- against -

466 BROOME STREET OF NEW YORK CITY,
INC., LORNA BRODY, EVELYN BRODY,
ANDREA COHEN and EVELYN BRODY and
LORNA BRODY AS TRUSTEES OF A TRUST
AND THE TRUST CREATED UNDER THE WILL
OF LEO BRODY,

Defendants.

-----x
BARBARA R. KAPNICK, J.:

Motion sequence numbers 001, 002 and 003 in the above-captioned action are consolidated for disposition. In motion sequence number 001, defendants move, pursuant to CPLR 4102 (c), to strike plaintiff's jury demand contained in his Note of Issue. In motion sequence number 002, defendants move, pursuant to CPLR 3212, to dismiss the first through sixth causes of action in the Amended Verified Complaint, dated December 7, 2009, on the ground that they fail to state a cause of action and are otherwise barred by the doctrines of *res judicata* and election of remedies. In motion sequence number 003, filed several months after the original argument on motion seq. nos. 001 and 002, plaintiff moves, pursuant to CPLR 3025 (b), for leave to serve a Second Amended Verified Complaint.

DECISION/ORDER

Index No.: 102427/09
Motions Seq. Nos.
001, 002 and 003

Plaintiff Robert Brody ("Robert") brings the within action to recover monies allegedly wrongfully expended by defendants Evelyn Brody ("Evelyn") and Lorna Brody ("Lorna"), Robert's mother and sister, respectively, during the time that Evelyn and Lorna controlled a family-owned corporation.

Factual Background

The Brody family consists of three siblings, Robert Brody, the oldest, Richard Brody and Lorna Brody, the youngest. Their mother is Evelyn Brody. Leo Brody, Evelyn's husband and the father of the three siblings, died in 1988. Leo owned a number of wholesale apparel companies, including UFO International, Inc. and UFO Contemporary, Inc. (together, "UFO"). Richard, Robert, Lorna and Evelyn were all, at some point, employed by Leo in various capacities at UFO. By all accounts, the family does not get along well. Richard left the family business and moved to Massachusetts in 1975.

In 1981, Leo decided to purchase a five-story industrial building at 466 Broome Street in Manhattan (the "Premises"). Leo formed 466 Broome Street of New York City, Inc. (the "Corporation") for the purpose of owning and operating the building. Richard, Robert, Lorna, Leo and Evelyn were equal shareholders of the

Corporation, with each holding ten shares, for a total of 50 shares.

The Premises consists of approximately 30,000 square feet of rentable space, including the basement. UFO occupied approximately 18,500 square feet on multiple floors of the Premises. In 1995, Robert and his family moved into the Premises and renovated a portion thereof for their own use.

When Leo died in 1988, he left most of his estate to Evelyn and Lorna, as Trustees of a Trust Created under the Will of Leo Brody for the benefit of Evelyn, during her lifetime (the "Trust"). Leo's ten shares of the Corporation went into the Trust, the corpus of which was to be divided in equal thirds to each of Leo's three children, upon Evelyn's death. Evelyn then distributed her ten shares in the Corporation to her three children. At that point, Richard, Robert and Lorna each owned 13.333 shares and the Trust owned ten shares.

In September 1995, Richard sold his 13.333 shares in the Corporation to Evelyn, Lorna and Robert for \$1.00. Richard later alleged that he did so based upon Evelyn's misrepresentations to him that the Corporation was losing money and was almost bankrupt.

Lorna, Evelyn and Robert continued to work together for UFO until April 2005, when Robert resigned as an officer and director. Evelyn held the majority of issued and outstanding shares of UFO and, according to Robert, as a result of the unequal distribution of the shares of the company, he had been stripped of all decision making authority. At this point, Robert still owned shares in the Corporation, which continued to own the Premises on Broome Street, but was no longer active in UFO.

Thereafter, on January 17, 2006, Lorna and Evelyn, who together owned a majority of the shares of the Corporation, voted Robert off the board of directors and installed Andrea Cohen, a friend of Lorna's, in his place as a director.

Robert's 2006 Action

In February 2006, Robert commenced a proceeding for judicial dissolution of the Corporation in Supreme Court, New York County, Index No. 102077/06 ("Action No. 1"). In Action No. 1, Robert alleged, *inter alia*, illegal and oppressive acts and conduct on behalf of Lorna and Evelyn individually, in their corporate capacities and as Trustees, directed towards Robert and his family, including their voting him off the board of directors and their threat to evict him, his wife and two children from their residence

at the Premises. He also asserted claims of mismanagement and waste of assets against his mother and sister.

That action was resolved by a "Stipulation of Settlement, Discontinuance and Order Approving Sale in Accordance with N.Y. B.C.L. §1114" dated November 8, 2006, and so-ordered by the Hon. Lewis Bart Stone (the "Action No. 1 Stipulation"). Pursuant to the Action No. 1 Stipulation, the parties agreed to the sale of the Premises pursuant to an existing contract with a third-party purchaser. The Action No. 1 Stipulation further provided in paragraph 2 that approximately thirty days prior to the closing on the contract of sale, the parties would "endeavor to estimate, with the assistance of the Corporation's accountants, the amount of Closing expenses, and additional costs and reserves necessary to wind down the Corporation." It further required Robert to pay the Corporation \$87,500.00, to release all rent claims made by Lorna and Evelyn.

The Action No. 1 Stipulation also provided that, except for amounts required for closing expenses, and the reasonable expenses, taxes and reserves of the Corporation and the Premises, all amounts would be distributed to the shareholders at closing in accordance with their share of ownership. Finally, the Action No. 1 Stipulation provided for Robert's release of any claims relating to

the Corporation or its operations through September 30, 2006. As to those claims arising after September 30, 2006, Robert reserved the right to contest payments made by the Corporation outside the ordinary course of business.

The closing took place on April 11, 2007. The Premises was sold for approximately \$19.5 million. At the closing, \$5,259,151.03 was remitted to Robert, \$5,788,648.50 to Lorna, \$4,341,608.90 to the Trust and \$1,964,008.59 to the Corporation for "wind down" expenses. However, no further distributions were thereafter made by Evelyn and Lorna from the Corporation.

Robert's 2007 Action

In August 2007, Robert brought a second action in Supreme Court, New York County, under Index No. 602707/07, against the Corporation, Lorna and Evelyn, individually, and as Trustees of the Trust, as well as against Andrea Cohen ("Action No. 2"). In Action No. 2, Robert contested the \$1,964,008.59 that had been remitted to the Corporation as "wind down" expenses. Robert alleged that Lorna and Evelyn had greatly exaggerated those expenses and, since the closing, had refused to account for the proceeds. Robert further alleged that, as an owner of the Corporation, he was entitled to his pro rata share of those funds. In addition, Robert alleged that at the closing of the Premises, the Trust received the sum of

\$4,341,608.91 and that, as trustees of the Trust, Evelyn and Lorna owed Robert a duty to properly manage the Trust, but were refusing to disclose any information regarding their management.

On September 19, 2008, Justice Stone ordered that within 30 days, the Corporation was to distribute all amounts held by it in proportion to the shareholder's interests in the Corporation, except for the sum of \$35,000, which was to be utilized in connection with a sidewalk violation concerning the Premises, and accounting fees and other miscellaneous expenses of the Corporation (the "2008 Order"). Justice Stone further directed that within 90 days of entry of the 2008 Order, Robert's accountant was to have full and complete access to the books and records of the Corporation, for the purposes of auditing such books and records to ascertain whether Robert had a claim arising out of, or relating to, the Action No. 1 Stipulation. Finally, Justice Stone directed that "[t]his Court shall retain jurisdiction for the purpose of enforcing this Order". Action No. 2 was dismissed "without prejudice" upon the aforementioned "directions, terms and conditions."

On November 24, 2008, the Corporation made its records available to Robert's certified public accountant, who objected to \$462,772.47 in payments by the Corporation, including \$340,636.38

in legal fee payments, because the underlying time records were withheld as privileged.

The Federal Court Action

In the meantime, in September 2007, Richard Brody brought an action in the United States District Court for the Southern District of New York, under Index No. 07 Civ 7981 (the "Federal Court Action"), claiming that Lorna, Evelyn and Robert misrepresented the financial health of the Corporation, which had fraudulently induced him to use his personal savings to pay corporate taxes and then to sell his 13.333 shares for \$1.00, an amount obviously less than the shares were worth. In his Complaint, Richard alleged, *inter alia*, that defendants mismanaged the Corporation by leasing the building at below market rates to Robert and to UFO.

Specifically, Richard alleged that in early 1993, Evelyn told him that money was needed to cover his portion of corporate taxes and to prevent foreclosure. Richard made four payments from 1993 to 1995 totaling \$44,000.00 and eventually told his mother that he could no longer afford to make these payments to the Corporation. According to Richard, the defendants then offered to buy his shares back for \$1.00. Richard alleged, *inter alia*, that he did not learn

of the fraud until 2006, when Robert contacted him about his lawsuit against Evelyn and Lorna.

According to Robert, on or about August 10, 2009 the parties in the Federal Action entered into a Settlement Agreement and General Release (the "Settlement Agreement") wherein the Federal Court Action was settled with Lorna, Robert and the Corporation paying approximately \$175,000 to Richard. In addition, the Settlement Agreement provided that the defendants and the Trust did not release each other from any claims for indemnification or contribution for legal fees and disbursements incurred in the Federal Action, "it being understood by the Defendants and the Trust that in connection with such claims they shall be litigated in the Supreme Court, State of New York, County of New York action brought by Robert having Index No. 102427/2009."

The Within Action

In February 2009, Robert commenced the within action ("Action No. 3"), alleging that the defendants had failed to comply with the Action No. 1 Stipulation by refusing to account or provide the means for Robert to determine amounts owed to the Corporation for periods subsequent to September 30, 2006. Robert further alleged that the defendants had failed to comply with the 2008 Order by failing to supply him with full and complete supporting

documentation and/or to reimburse the Corporation in the amount demanded. In his original Complaint Robert alleged causes of action for breach of contract and/or fiduciary duty (first cause of action), judgment directing that the defendants comply with the Action No. 1 Stipulation and the 2008 Order (second cause of action), judgment directing an accounting for all receipts, disbursements and expenditures of the Corporation commencing on September 30, 2006 (third cause of action), rescission of the release contained in the Action No. 1 Stipulation and an accounting of all receipts, disbursements and expenditures of the Corporation from February 1, 2000 through the present (fourth and fifth causes of action), and an accounting of all receipts, disbursements and expenditures of the Corporation from February 1, 2000 (sixth cause of action).

Thereafter, Robert served an Amended Verified Complaint, dated December 7, 2009, adding causes of action for indemnification and contribution for all costs, disbursements and attorney's fees incurred in defending the Federal Court Action (seventh cause of action) and attorney's fees incurred in defending the Federal Court Action (eighth cause of action).

Defendants' Motion for Partial Summary Judgment (mot. seq. no. 002)

On May 25, 2011, this Court heard oral argument on defendants' motion for partial summary judgment on the record. It was noted

that in the first cause of action which was framed as a breach of contract and/or breach of fiduciary duty claim, Robert alleged that defendants had breached the Action No. 1 Stipulation and the 2008 Order in that they did not provide the accounting required in those documents. However, since the commencement of this action, defendants have provided the relevant documents. This Court, therefore, ruled that plaintiff did not have a breach of contract claim as to the documents (Transcript, 33: 6-8, May 25, 2011). The second cause of action sought a judgment by the Court directing specific performance of the Action No. 1 Stipulation and the 2008 Order. The fourth and fifth causes of action sought rescission of the Action No. 1 Stipulation. As to these causes of action, this Court noted on the record that plaintiff had not made out its claims for specific performance or rescission (*Id.* 33:8-13; 34:12-15, 35:4-5). Robert's third and sixth causes of action sought an accounting for all receipts, disbursements and expenditures of the Corporation from and after February 1, 2000. The sixth cause of action was based upon a rescission of the Action No. 1 Stipulation, wherein Robert released all claims against the Corporation prior to September 30, 2006. Having found that there were insufficient grounds for a rescission, this cause of action also had to be dismissed. The third cause of action for an accounting of expenditures after September 30, 2006, however, is proper and could

continue. Defendants never moved against the seventh or eighth causes of action.

However, in light of the decision on mot. seq. no. 003, addressed immediately below, the Amended Complaint is no longer the operative pleading in this action.

The Motion For Leave to Amend the Complaint (mot. seq. no. 003)

During the May 25, 2011 oral argument, this Court agreed with the parties that there were remaining issues in this case with respect to attorney's fees, whether or not the Corporation or the individuals should have been paying the legal fees, and whether a monetary payment to UFO made sense (*Id.*, 35:8-12). This Court directed the parties to meet and confer in an attempt to agree on what the outstanding issues were and to narrow them down. (*Id.*, 37:3-5, 37:25-38:3).

Plaintiff sent a proposed Second Amended Verified Complaint to defendants for review in September 2011, but the parties could not agree as to plaintiff's remaining claims. Thus, this Court signed an Order to Show Cause by plaintiff on October 3, 2011, for leave to amend his Amended Verified Complaint. This motion was argued on the record on December 7, 2011.

In the proposed Second Amended Complaint, Robert alleges causes of action for recovery of legal fees improperly paid by the Corporation in connection with the dissolution proceeding (first and second causes of action); recovery of legal fees and expenses incurred by the Corporation and Robert in connection with Action No. 2 (third and fourth causes of action); recovery of accounting fees and expenses incurred by the Corporation in connection with Action No. 2 (fifth cause of action); legal fees and expenses incurred by the Corporation and Robert in connection with this Action (sixth cause of action); recovery of Robert's costs, disbursements and attorney's fees in connection with the Federal Court Action by way of common law indemnity and contribution (seventh cause of action); or pursuant to the Business Corporation Law ("BCL") and/or By-laws of the Corporation (eighth cause of action); recovery of excessive legal fees and expenses in connection with the Federal Court Action (ninth cause of action), recovery of the Corporation's improper \$96,608.39 payment to UFO (tenth cause of action) and damages caused by the wrongful reclassification of Robert's "paid in capital" (eleventh cause of action).

Pursuant to CPLR 3025(b), leave to amend a pleading "shall be freely given upon such terms as may be just" "In the absence of prejudice or surprise resulting directly from the delay

in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Jablonski v Jakaitis*, 85 AD3d 969, 971 [2d Dept 2011], quoting *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008]). Defendants do not oppose the proposed Second Amended Complaint with regard to the seventh, eighth and tenth causes of action. However, as to the first through sixth causes of action, the ninth cause of action and the eleventh cause of action, defendants contend that the pleading fails to state a cause of action and that the defendants would be prejudiced by allowing the amendment to proceed at this late date.

Robert's proposed first and second causes of action are to recover his *pro rata* share of the legal fees improperly paid by the Corporation in connection with the dissolution proceeding (Action No. 1). As to these causes of action, Robert alleges that in authorizing the Corporation to pay those fees, Lorna, Evelyn, Andrea and the Trust were in violation of their fiduciary duties to Robert (first cause of action) and in breach of the Action No. 1 Stipulation by failing, as required by that Stipulation, to distribute to Robert, his *pro rata* share of the proceeds from the closing (second cause of action).

Defendants contend first that although Robert alleges that the Corporation paid a total of \$142,055.00 in legal fees with respect to Action No. 1, in fact, most of the money spent during that time was for work regarding a sidewalk violation and the closing. Defendants' attorney asserts that only approximately \$6,141.00 of the time records underlying the subject legal bills in fact cover billing for Action No. 1. This objection merely goes to the amount of damages and not to the validity of the claim.

Defendants also argue that Robert's second cause of action in the proposed Second Amended Complaint contains new facts which must be supported by an affidavit of merit. As an initial matter, the allegations in this cause of action are hardly new. Action No. 2 was based upon allegations that Lorna, Evelyn and Andrea had failed to distribute the assets of the Corporation upon dissolution, and the issue of attorney's fees was raised therein. Moreover, to the extent that an affidavit of merit is required, CPLR 105 (u) provides that "[a] 'verified pleading' may be utilized as an affidavit whenever the latter is required."

Finally, defendants contend that this Court has already ruled on the record that there was no breach of contract claim with regard to the Action No. 1 Stipulation. However, this action was initially brought because the defendants had failed to account for

the Corporation's expenses for periods subsequent to September 30, 2006. During the course of this action, defendants eventually provided that documentation, and this Court recognized that fact on the record on May 25, 2011 as follows:

As a matter of fact, I think they pretty much did comply with the stipulation except for these documents This seems to be an issue mostly about the attorneys' fees and whether or not they were reasonable or whether or not the corporation should have been paying the legal fees, or the individual should have been paying [their] own legal fees and the \$100,000 for the payment to . . . UFO

What I really think this is is this would be a trial or a hearing on whether or not they should have had - who should have paid the legal fees, and how much should have been paid and whether this money payment for UFO makes sense.

(Tr. 34:15-17, 34:23-35:2, 35:8-12).

It is worth noting that there is no authority for allowing counsel fees incurred in defending a dissolution proceeding to be paid out of corporate funds (*Matter of Rappaport*, 110 AD2d 639, 641 [2d Dept 1985]). Moreover, having already recognized that there are issues as to whether the Corporation should have been paying attorney's fees in Action No. 1, this Court finds that the first and second causes of action in the proposed Second Amended Complaint are adequately pled.

In Robert's proposed third and fourth causes of action he alleges that as a result of Evelyn, Lorna, Andrea and the Trust's refusal to distribute the Corporate funds as required by the Action No. 1 Stipulation, and their failure to account for amounts improperly expended by the Corporation for the period subsequent to September 30, 2006, Robert was forced to commence Action No. 2. Robert contends that as a result of this "wilful failure" he is entitled to recover both his legal expenses and his pro rata share of the Corporation's legal expenses in Action No. 2. In his third cause of action, Robert seeks to recover these fees based upon defendants' breach of their fiduciary duty and in his fourth cause of action he seeks to recover these amounts as a result of defendants' breach of the Action No. 1 Stipulation.

As to these causes of action, defendants contend that Robert has not previously sought recovery of \$58,625.97 for his personal legal fees and expenses in Action No. 2, and that this new factual allegation requires an affidavit of merit, and secondly, that defendants are prejudiced by the sudden inclusion of these new claims after completion of discovery and after the Note of Issue has been filed. Defendants also claim that Robert is not entitled to recovery of his legal fees in Action No. 2 because the 2008 Order, which resolved Action No. 2, precludes all other claims arising out of the same transaction or series of transactions.

Plaintiff has not stated a cause of action for recovery of his own legal fees. New York follows the "American Rule" with regard to legal fees, which holds that a party cannot recover legal fees from another "except where authorized by statute, agreement or court rule" (*Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204 [1st Dept 2010], lv den 17 NY3d 713 (2011), quoting *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]). Here, plaintiff has not been able to set forth any of said grounds for recovery of his legal fees, and the cases cited by him are not on point. *Johnson v Chapin* (49 AD3d 348 [1st Dept 2008], *affd. as mod* 12 NY3d 461 [2009]) was a matrimonial action and attorney's fees were authorized by New York's Domestic Relations Law. In other cases cited by the plaintiff, attorney's fees were awarded as sanctions for frivolous behavior, pursuant to 22 NYCRR 130-1.1 and/or New York Mental Hygiene Law. Accordingly, that portion of the motion for leave to amend the Amended Complaint as to the third and fourth causes of action is denied insofar as Robert asserts a claim for his own attorney's fees.

However, defendants' contention that Robert's claim for recovery of his *pro rata* share of the Corporation's legal fees is precluded by the doctrine of *res judicata* is without merit. The 2008 Order specifically dismissed plaintiff's claim "without prejudice" and provided for plaintiff to determine, after complete

access to the Corporation's books and records, whether plaintiff had a claim relating to payments made by the Corporation after September 30, 2006.

Finally, defendants argue that the Corporation was the primary defendant in Action No. 2 and was, therefore, entitled, pursuant to BCL 722 (a), to defend itself and its officers.

BCL 722 (a) applies only "if such director or officer acted, in good faith. . ." In Action No. 2, Robert alleged that defendants Evelyn, Lorna, Andrea and the Trust had caused the Corporation to breach the Action No. 1 Stipulation by, inter alia, holding excessive amounts as "wind down" expenses and by failing to give Robert access to books and records of the Corporation. Moreover, the individual defendants, as directors in a close corporation, owed Robert a fiduciary duty to protect his continuing ownership interest in the Corporation (*Giblin v Murphy*, 73 NY2d 769, 771 [1988]). The corporate entity cannot shelter individuals from responsibility for breaches of duty of care they may independently owe as directors (*id.*). The issue as to whether Evelyn, Lorna and Andrea improperly used their positions as directors of the Corporation was not resolved in Action No. 2 and, since that action was dismissed "without prejudice," that issue may be asserted herein. Accordingly, as to the third and fourth causes

of action of the proposed Second Amended Complaint, Robert may seek to recover his *pro rata* share of those fees paid by the Corporation in defense of Action No. 2.

In the fifth cause of action of the proposed Second Amended Complaint, Robert seeks to recover accounting fees and expenses incurred by the Corporation as a result of Action No. 2. Again, as to this cause of action, Robert alleges that Evelyn, Lorna and Andrea willfully refused to comply with the Action No. 1 Stipulation, thereby necessitating Action No. 2 and the resulting expenses incurred by the Corporation. Defendants allege that the accounting was performed in 2008, pursuant to the 2008 Order directing an audit, and that these expenses would have been incurred regardless of whether the task had been performed prior to the institution of Action No. 2. This, however, is an issue of fact to be determined at trial.

In the sixth case of action of the proposed Second Amended Complaint, Robert seeks recovery of both the Corporation's and his own legal fees incurred in the current action (Action No. 3). As previously determined, Robert is not entitled to his own legal fees. However, if the individual defendants are determined to have breached fiduciary duties owed to Robert and wilfully breached the Action No. 1 Stipulation, the Corporation's attorney's fees

incurred in defending the subsequent lawsuits brought by Robert constitute damages incurred as a result of their actions (see *Giblin v Murphy*, 73 NY2d 769, *supra.*). Accordingly, that part of the sixth cause of action in the proposed Second Amended Complaint seeking recovery of the Corporation's legal expenses in Action No. 3 is adequately pled.

The proposed ninth cause of action is to recover damages caused by the Corporation's payment of excessive legal fees and expenses in connection with the Federal Action. In this cause of action, Robert alleges that defendants' billing records show that the Corporation paid approximately \$262,375.16 in legal fees in connection with the Federal Action. Robert, who paid his own legal fees in that action, alleges that he spent \$45,891.66 in defense of that action and that the action was settled prior to depositions being conducted.

Robert contends that the Settlement Agreement in the Federal Action provides that the parties will share equitably the costs of the defense of the Federal Action among the shareholders of the Corporation. Robert further alleges that Lorna, Evelyn, Andrea and the Trust have breached their fiduciary duties as holders and/or persons in control of the majority of the Corporation and as officers and/or directors of the Corporation by causing the

Corporation to pay excessive legal fees and expenses in connection with the Federal Action.

As to this cause of action, defendants assert that: (1) Robert's allegations as to the amounts of legal fees are incorrect; (2) the Corporation ran out of money during the Federal Action and the attorney's fees were paid by the individual defendants; and (3) defendants have a claim over against Robert for contribution towards the Corporation's legal fees in that action. Each of these objections, however, raise issues of fact and do not go to the issue of whether Robert has stated a valid cause of action to recover excessive legal fees. Accordingly, this cause of action may be asserted in the proposed pleading.

In the proposed eleventh cause of action, Robert seeks to recover damages caused by the wrongful reclassification of his "paid in capital." Robert alleges that according to the Corporation's books and records, on or about January 1, 2009, certain paid in capital put into the Corporation by him, was wrongfully "reclassified" by the Corporation.

Defendants assert that Robert learned of this reclassification by April 22, 2010, at the deposition of the Corporation's accountant, and yet waited approximately 17 months to move to

amend his Complaint. Defendants assert that they are prejudiced by this late amendment. However, inasmuch as this cause of action arises as a result of defendants' accounts during a period of time during which they maintained control over the Corporation, they have complete access to all of the necessary information regarding this claim and are not prejudiced by its inclusion.

The Motion to Strike the Jury Demand (mot seq. no. 001)

In this motion, defendants move, pursuant to CPLR 4102(c), to strike plaintiff's jury demand.

CPLR 4101 provides for a jury trial in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only" or in "any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury."

However, where a plaintiff asserts both legal and equitable causes of action arising out of the same alleged wrongdoing, he waives his right to a jury trial (see *Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846 [1st Dept 1990]; *O'Rorke v Carpenter*, 125 AD2d 223, 224 [1st Dept 1986]; *Kaplan v Long Is. Univ.*, 116 AD2d 508, 509 [1st Dept 1986]).

By joining his equitable claims for an accounting with legal claims for money damages arising out of the same transactions, Robert has waived his right to a trial by jury (*Trepuk v Frank*, 104 AD2d 780 [1st Dept 1984], citing *Epstein v Paganne Ltd.*, 39 AD2d 855 [1st Dept 1972]; *Gabbay v Ratchik*, 60 AD2d 593 [2d Dept 1997]; *Sepinski v Bergstol*, 81 AD2d 860 [2d Dept 1981]). Accordingly, defendants' motion to strike plaintiff's jury demand is granted.


The Second Amended Verified Complaint in the form annexed to the moving papers shall be deemed to have been served *nunc pro tunc* as of the date of service of the Order to Show Cause.

The defendants are directed to serve an Answer to all remaining claims in the Second Amended Verified Complaint or otherwise respond thereto within 30 days of the entry of this Decision/Order in the e-filing system.

Counsel shall then appear in IA Part 39, 60 Centre Street-Room 208 on January 8, 2014 at 10:00 a.m. to discuss any outstanding discovery, and the scheduling of the trial.

This constitutes the decision and order of this Court.

Dated: November 21, 2013



BARBARA R. KAPNICK
J.S.C.