

**Borger v Weiss**

2016 NY Slip Op 30463(U)

March 17, 2016

Supreme Court, New York County

Docket Number: 156110/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
JUDY BORGER, as a member and director of the  
Applebaum Foundation, Inc.,

Plaintiff,

Index No. 156110/12

-against-

**DECISION/ORDER**

WARREN A. WEISS, et al.  
Defendants.

-----X

**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for: \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Judy Borger, as a member and director of the Applebaum Foundation, Inc. (the “Foundation”), has commenced the present action against the defendants Warren A. Weiss (“Weiss”), Alan T. Applebaum (“Alan”) and the Foundation to remove Weiss and Alan as officers and directors of the Foundation for breach of their fiduciary duties pursuant to N-PCL section 717 and to compel Weiss to account for his conduct pursuant to N-PCL 720 (C). Since the action has commenced, defendant Alan has passed away. Although no executor has been substituted in his place, the action may proceed pursuant to CPLR section 1015 as the only claim against him, to remove him as an officer and director of the Foundation, has been extinguished by his death. Therefore, this action will proceed without him pursuant to CPLR section 1015. The remaining defendants, Weiss and the Foundation, have brought the present motion to

dismiss the complaint filed by plaintiff pursuant to New York Civil Practice Law and Rules (“CPLR”) §§ 3211(a)(1), (a)(5) and (a)(7)2 or to convert the motion to a motion for summary judgment pursuant to CPLR §3211(c). As will be explained more fully below, the motion by the defendants to dismiss the complaint is granted.

The relevant facts, as alleged in the complaint, are as follows. On or about December 1949, Joseph Applebaum and his wife, Leila Applebaum, started the Foundation. Joseph Applebaum died in 1985. After Joseph’s death, Leila became the principal director of the Foundation and later became the Chairman of the Board of Directors of the Foundation. Leila passed away in 2014. At the time this action was commenced, plaintiff Borger was one of five members of the Foundation. Defendant Weiss is a director and president of the Foundation and is Leila’s brother. The Foundation is a New York not- for-profit Corporation.

According to the complaint, Weiss unilaterally decides which causes to donate Foundation money towards, without consultation with any of the other members of the board of directors in violation of the Foundation’s by-laws which specifically provide that “except as otherwise provided by law or by these By-Laws, each matter shall be determined by a majority vote of the members present in person or by proxy and voting on the question.” Plaintiff alleges in the complaint that after Joseph’s death, Weiss made donations of \$75,000 at a time to the College of William and Mary, without complying with the voting requirements of the by- laws. The complaint further alleges that Weiss made a \$1 million donation through the Foundation to Ohr Torah Stone in 2006- 2007 and a \$600,000 donation to Ohr Torah Stone in 2013 without any consultation with or a vote by the Board of Directors.

Plaintiff alleges in the complaint that defendant Weiss violated his fiduciary duties to the Foundation by making contributions on behalf of the Foundation without consultation with any

of the other members of the board of directors in violation of the Foundation's by-laws requiring a majority vote of members for such actions and in violation of N-PCL section 717 which provides that directors and officers "shall discharge the duties of the respective positions in good faith and with the care and ordinarily prudent person in like position would exercise under similar circumstances." Defendants have brought the present motion to dismiss the complaint on the ground that the undisputed documentary evidence establishes that the plaintiff never objected to, and ratified, confirmed and approved the very transactions that form the basis of her claims.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a) (1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002). Moreover, both tax returns and minutes of shareholder and board meetings constitute documentary

evidence. See *762 Park Place Realty, LLC v. Lehrer*, 47 Misc. 3d 1217(A) (Sup Ct Kings Co 2015); *Buttita v. Greenwich House Coop Apt, Inc.*, 11 A.D.3d 250 (1<sup>st</sup> Dept 2004).

The court finds that Weiss is entitled to dismissal of the complaint on the ground that the documentary evidence he has submitted, which consist of board minutes, unanimous consents of all the members of the Foundation and Foundation tax returns, conclusively establishes that plaintiff ratified, confirmed and approved the contributions made by Weiss on behalf of the Foundation which she is now attempting to challenge. These documents establish that from 1992 through 2013, the members of the Foundation held special meetings or took action by unanimous consent in lieu of the annual meeting of members, and that the members ratified, confirmed and approved the tax returns of the Foundation for the previous years in all respects, which tax returns listed all of the contributions made by defendant Weiss on behalf of the Foundation. Included in these documents are the minutes of special meeting in lieu of annual meeting of members of the Foundation dated July 31, 2013, which minutes indicate that plaintiff Judy Borger is present, that the meeting is being held in Lieu of the annual meeting, that there is a statement by the chairman that all of the activities of the Foundation are reflected in the income tax returns of the Foundation, that copies of the returns are available for inspection at the meeting and in the office of Weiss, and that a resolution is unanimously approved resolving "that the actions taken by the directors and officers of the Foundation, as reflected in the Federal Income Tax returns of the Foundation and the reports to the Attorney General Of the State of New York, are hereby ratified, confirmed and approved in all respects." Pursuant to these 2013 minutes, plaintiff specifically ratified, confirmed and approved all of the contributions which are challenged in her complaint which took place from 2008 to 2013. Defendants have also attached the relevant tax returns which list all of the contributions being challenged by plaintiff

in the present action. Because plaintiff has specifically consented to and ratified, confirmed and approved the very contributions which she now challenges, she fails to state any valid claim that defendant Weiss violated either the by-laws or his fiduciary duties by making these contributions without the consent of the Foundation members.

The court also finds that any claim for breach of fiduciary duty based on unjust enrichment or misappropriation of Foundation assets is insufficient as a matter of law as it is undisputed that all of the contributions which plaintiff challenges were made to third parties, the College of William and Mary and Ohr Torah Stone, by Weiss on behalf of the Foundation and that Weiss did not receive any financial benefit from any of these contributions. Thus, he cannot have been unjustly enriched from these contributions or misappropriated any Foundation assets as a matter of law.

The argument by plaintiff that the 2013 minutes do not prove her ratification and consent because they do not reflect any specific tax return or financial report being ratified is without basis. The documentary evidence which defendants have submitted establish that from 1992 through 2013, whenever the members had their meeting, they ratified, confirmed and approved the tax returns for all the years from the last meeting until then. For example, a members meeting was held on August 30, 1996 and the next meeting took place on August 9, 1998, when the members approved, ratified and confirmed the tax returns for the fiscal years ending in February 1997 and 1998. After that, the next meeting took place on December 7, 2007 at which the members, including plaintiff, who was present, approved ratified and confirmed the tax returns for the fiscal years ending in February 1999 through 2007. After that the next meeting was on July 13, 2013 at which the members approved, ratified and confirmed the tax returns for the fiscal years ended February 2008 through 2013.

The argument by plaintiff that she should not be permitted to ratify or approve any wrong done to the Corporation which is a breach of fiduciary duty is without basis. Plaintiff has failed to allege that there is any wrong done to the Foundation or anything improper about the charitable contributions made by Weiss on behalf of the Foundation other than the fact that they were not approved by the members of the Foundation. Since the documentary evidence establishes that the members did approve of the contributions made by Weiss, she has failed to allege that Weiss breached any fiduciary duty by making the contributions.

To the extent that plaintiff argues in her opposition memorandum of law for the first time that Weiss breached his fiduciary duties to the Foundation by virtue of the fact that there were no annual meetings held for the five years from 2008 to 2012, she has failed to make this allegation in her complaint or in any affidavit in opposition to the motion to dismiss. As a result, this claim cannot be considered in opposition to the present motion to dismiss the complaint. See *Rovello v. Orfino Realty Co., Inc.*, 40 N.Y.2d 633, 635(1976) (“Under CPLR 3211, a trial court may use affidavits in its consideration of a pleading motion to dismiss”); *Eastern Consolidated Properties, Inc., v. Lucas*, 285 A.D.2d 421 (1<sup>st</sup> Dept 2001) (opposing affidavits may be used to amplify the pleading).

Based on the foregoing, the motion to dismiss the complaint is granted. If plaintiff wishes to amend, she should make a motion to amend and attach a copy of the proposed pleadings to the motion papers. The foregoing constitutes the decision and order of the court.

Dated: 3/17/16

Enter: CK

**CYNTHIA S. KERN**  
J.S.C. J.S.C.