

<b>Matter of Piazza v Gioia</b>
2016 NY Slip Op 31430(U)
July 21, 2016
Supreme Court, Kings County
Docket Number: 5786/2015
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21<sup>st</sup> day of July, 2016.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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IN THE MATTER OF THE APPLICATION OF ANTONIO PIAZZA, INDIVIDUALLY, AND DERIVATIVELY ON ON BEHALF OF KINGS COUNTY WATERPROOFING CORP., AND AS THE HOLDER OF 40 PERCENT OF ALL OUTSTANDING SHARES OF KINGS COUNTY WATERPROOFING CORP.,

Petitioner/Plaintiff,

For the Dissolution of Kings County Waterproofing Corp., a Domestic Corporation,

-And as against -

Index No. 5786/2015

JOSEPH GIOIA, INDIVIDUALLY, AND AS THE HOLDER OF ALL OUTSTANDING SHARES OF KINGS COUNTY WATERPROOFING CORP., AS AN OFFICER AND DIRECTOR OF KINGS COUNTY WATERPROOFING CORP.,

Respondent/Defendant,

AND JOSEPH D. GIOIA AND VENEER RESTORATION AND MAINTENANCE INC.,

Defendant.

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The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Memoranda of Law \_\_\_\_\_

Papers Numbered

50-70      72-74  
85-95, 97  
71 96 99 100 75 83 101

Upon the foregoing papers, in this hybrid proceeding and action brought by petitioner/plaintiff Antonio Piazza (Piazza), pursuant to Business Corporation Law § 1104-a for the judicial dissolution of Kings County Waterproofing Corp. (KCWC), a domestic corporation, and related claims alleging misappropriation of corporate assets, corporate waste, and usurping corporate opportunities, and seeking damages for breach of fiduciary duty and unjust enrichment, an accounting, and the imposition of a constructive trust, respondents Joseph Gioia (Gioia) and KCWC move, under motion sequence number five, for an order, pursuant to CPLR 404, 3211 (a) (1), (3), and (7), and 3212, dismissing Piazza's claims against them, which are set forth in his verified petition, dated April 22, 2015, with prejudice, and directing Piazza to sell his KCWC shares to them, in accordance with their shareholder agreement. Defendants Joseph D. Gioia (JDG) and Veneer Restoration and Maintenance Inc. (Veneer) move, under motion sequence number four, for an order dismissing the fourth, sixth, eighth, and tenth causes of action of Piazza's verified petition, which are asserted against them, with prejudice, pursuant to CPLR 3211 (a) (1), (3), and (7), or, alternatively, converting the instant special proceeding to a plenary action as to them pursuant to the court's power under CPLR 103 (c).

### **Facts and Procedural Background**

KCWC is a domestic business corporation organized under the laws of New York, which was incorporated in 1979. KCWC is involved in the business of installing, maintaining, and repairing waterproofing systems and components on buildings. During its

years of operation, KCWC also purchased real estate, which included its business location at 1200 Utica Avenue, in Brooklyn, and investment properties. In addition, KCWC held a substantial portfolio of stocks and other financial investments.

KCWC was founded by Piazza and the late Vincenzo "Enzo" Gioia (Enzo), and, in 1979, Piazza held 40% and Enzo held 60% of all of KCWC's outstanding shares. Enzo primarily handled office management operations, and Piazza primarily served as the executive in the field, directing and managing all site operations for KCWC projects.

Gioia is Enzo's son, who began working for KCWC at its inception when he was in his early twenties. At that time, Gioia was the president, Piazza was the vice-president, and Enzo was the secretary of KCWC. In 1982, Enzo and Piazza relinquished 53 shares and 13 1/3 shares, respectively, of KCWC to Gioia, rendering each of them and Gioia one-third owners of KCWC. On April 1, 1982, a shareholders' agreement was signed pursuant to which it was agreed that Enzo would receive 80% of the salary that Piazza and Gioia received since Enzo was working less and had entered into a phase of semi-retirement. This agreement set forth that Enzo, Piazza, and Gioia were the three members of the board of directors.

A revised shareholders' agreement (the shareholders' agreement) was executed by Enzo, Piazza, and Gioia on August 13, 1996, which is the shareholders' agreement which presently remains in effect. The shareholders' agreement set forth that Enzo, Gioia, and

Piazza were KCWC's directors and that Gioia was its president and Piazza was its vice-president.

As relevant to this proceeding, the shareholders' agreement, in paragraph 2, entitled "Restrictions on Stock," provided that "[e]ach of the Stockholders expressly agrees that he will not *encumber, or dispose of* all or part of the stock of the Corporation which he now owns or may hereafter acquire," without obtaining "the written consent of the other Stockholders" (emphasis added). This paragraph further provided that "[i]n the absence of such written consent, the Stockholder desiring to dispose of his stock must give to the other Stockholders hereto not less than sixty days' written notice of his intention to sell his shares," and the other Stockholders then would "have the option within 30 days of such notice to purchase all of such stock in proportion to their stock ownership in the Corporation at that time." This paragraph stated that if Enzo was the stockholder giving notice of intention to sell his shares, Gioia could elect to purchase 51% of those shares. The election to exercise the option to purchase was required to be in writing, and the purchase price and payment thereof was to be "the last stipulated price preceding the date of the notice to sell the shares." This paragraph additionally set forth that if not all of the stock offered were purchased by the other stockholders, then KCWC would purchase all of the shares of the offering stockholder. Payment of the purchase price was to be as provided in paragraph four of the shareholders' agreement, which set forth that 20% of the purchase price was to be paid within 60 days after the time allotted for the exercise of the option to purchase, and the balance was to be paid by a series of 96 non-negotiable promissory notes of equal amounts, with interest.

Enzo formally retired as a director and officer of KCWC by a letter dated April 1, 1996. At a December 31, 2001 shareholders' meeting, Piazza agreed to resign as vice-president and retire as an employee of KCWC by December 31, 2001. While retired, Piazza continued to provide the necessary financial backing to KCWC for project and company financing, guarantees, and bonding purposes so that KCWC could continue to prosper and in order to protect the value of his shares in KCWC. Piazza's project financing, surety bonds, and personal guarantees enabled KCWC to secure and perform large contracts.

Piazza's post-retirement salary was initially \$3,000 per month, which was increased to \$3,500 per month in 2008, to \$4,000 per month in 2012, and to \$5,400 per month (or \$64,800 annually) in June 2014. While KCWC had paid Enzo 80% of the salary being paid to Gioia and Piazza when he retired, Piazza, over the past 10 years, was paid an average monthly salary of \$3,473, which amounts to approximately 8% of Gioia's average monthly salary of over \$41,686 per month.

By a letter dated August 4, 2002, Enzo, pursuant to paragraph 2 of the shareholders' agreement, gave his 60-day written notice of his intention to sell all of his stock in KCWC at the then stipulated value of \$1,300,000. Gioia then exercised his right pursuant to paragraph 2 of the shareholders' agreement to purchase 51% of those shares for \$673,000. This purchase price was based upon the last stipulated price of \$19,500 per share preceding the date of Enzo's notice to sell the shares, which had been established at the August 1, 2002 meeting of KCWC's shareholders and directors, which took place three days before Enzo's

notice. Enzo held a note for Gioia with payment terms that extended beyond Enzo's life, and the note was eventually paid to Enzo's estate,<sup>1</sup> of which Gioia was an heir.

Due to the fact that Gioia's purchase of 51% of Enzo's shares made him a majority shareholder of KCWC even if Piazza was to purchase all of Enzo's remaining shares, Piazza elected not to purchase these remaining shares. The other 49% of Enzo's stock was purchased by KCWC for \$637,000 and KCWC now owns those shares as treasury stock. Following these purchases and as of the present time, Gioia owns 101 1/3 shares of KCWC, representing 60% of KCWC's outstanding shares (rendering him the majority shareholder), and Piazza owns 66 2/3 shares of KCWC, representing 40% of KCWC's outstanding shares (rendering him a minority shareholder).

According to Piazza, after Gioia became the majority shareholder of KCWC, he became combative and fostered an environment of conflict, causing their relationship to sour. From 2004 to 2009, Gioia caused KCWC to liquidate some of KCWC's assets, including its 50% interest in Superior Scaffolding, an independent scaffolding company that worked on projects with KCWC and which KCWC had helped to create with Piazza's financial support. Gioia claimed that it was necessary to sell Superior Scaffolding to avoid a tax liability, and that KCWC made a significant profit on its investment in Superior Scaffolding. Gioia also caused KCWC to sell its real estate at 9530 Avenue L in 2005 or 2006, and a vacant lot in West Babylon. After Piazza objected to the sale of 9530 Avenue L and these

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<sup>1</sup>Enzo passed away in 2006. The payments for Enzo's shares lasted until 2011, at which time the purchase price for his shares was paid in full.

protests went unheeded, he purchased this property himself. Piazza did not receive any profits, distributions, or other remuneration from either the liquidation of Superior Scaffolding or the vacant lot in West Babylon. Gioia claims that the proceeds were used to fund KCWC's operations.

At a joint annual meeting of the stockholders and directors of KCWC held on November 28, 2007, the stockholders stipulated that the then current value for each share of the issued and outstanding stock of KCWC was \$25,000. Piazza's stock (i.e., his 66 2/3 shares of KCWC), if valued pursuant to paragraph 2 of the shareholders' agreement, would have a stipulated value of \$1,666,500. Thereafter, Piazza and Gioia unsuccessfully and continually attempted to negotiate a purchase of Piazza's shares in KCWC. On multiple occasions, Gioia offered to purchase Piazza's KCWC shares for more than the "last stipulated price," but Piazza rejected these offers.

While Piazza has not attended a KCWC board meetings since 2007, he attended via proxy and power of attorney by his daughter, Franca Rutigliano (Franca) (who is a New York State licensed attorney), who has attended these meetings and voted Piazza's interests on his behalf on a regular basis. At an annual meeting of the stockholders of KCWC held on June 12, 2009, which Piazza did not attend, Gioia's son, JDG, was elected to be a director of KCWC by a unanimous vote of the shareholders present and a majority of the outstanding shares of the company, i.e, by Gioia. At that time, JDG was 19 or 20 years old, and Piazza claims that JDG's election was a sham and was only for the purpose of installing a director

over which Gioia had control. At this same meeting, it was stipulated and agreed by unanimous vote of the shareholders present and by majority vote of the overall outstanding shares of KCWC that the value for each share of stock was \$31,500. The minutes of this meeting stated that the \$31,500 value was derived as a result of discussions had with Piazza with regard to his informal notice of his intention to sell his shares of the stock of KCWC.

In 2009, unbeknownst to Piazza, JDG, while a director of KCWC, incorporated Veneer, a corporation which specializes in comprehensive building exterior restoration and weatherproofing. Piazza claims that Veneer is a competitor of KCWC. Gioia denies this, asserting that KCWC and Veneer cannot be in competition and Veneer could not have taken any of KCWC's corporate opportunities because Veneer uses non-union employees and KCWC uses only union employees. Piazza asserts that Gioia assisted JDG and Veneer with its startup and provided JDG, who was only 21 years old when Veneer was created, with the use of KCWC's assets for Veneer. Piazza claims that Veneer, among other things, improperly diverted and siphoned KCWC's assets, resources, and opportunities. Specifically, Piazza alleges that Veneer has used KCWC's real estate, that Veneer has used KCWC's employees to work on Veneer projects or perform services for its benefit, that Veneer has used KCWC's vehicles, equipment, and tools for no compensation, and that Veneer has diverted KCWC's goodwill and corporate opportunities.

At an annual meeting of the stockholders and directors of KCWC held on August 25, 2011, JDG resigned as a director of KCWC and Alexandra Mary Gioia (Alexandra), who is

Gioia's daughter and had not yet graduated from college, was elected as a director. Franca objected on Piazza's behalf based on Alexandra's lack of experience. Using his majority owner status, Gioia voted Alexandra as a board member. At that same meeting, Gioia stated that the current value for each share of the issued and outstanding stock was \$29,586.21. Franca, as proxy for Piazza, objected to this valuation as undervaluing KCWC.

At a February 22, 2013 annual meeting of stockholders and directors of KCWC, Gioia brought to vote the value of KCWC and it was decided by a majority vote that the current value for each share of the issued and outstanding stock was \$29,586.21. Franca, as proxy for Piazza, abstained from voting.

Piazza asserts that while Gioia admits that KCWC's average contract revenue was \$15 million, with an average annual gross profit of 15.13%, from the time that Gioia became the majority shareholder of KCWC, not a single dollar of profit has been distributed to the shareholders (which consist of him and Gioia) as a dividend payment. Piazza further points to the fact that Gioia purchased a new \$126,000 2014 Mercedes CLS for his own personal use and took \$500,000 in salary and benefits while KCWC was operating at a loss and sold \$970,000 worth of real estate (consisting of properties that Piazza located and secured for KCWC to ensure stock value stability) in order for KCWC to fund its operations.

In August 2014, Gioia sold KCWC's real property located at 1222 Utica Avenue for \$175,000, and, in September 2014, Gioia sold KCWC's real property located at 1358 Utica Avenue for \$595,000. Piazza was unaware of one sale until after it occurred, and objected

to the other, and received no money from the sale of either of these properties. While Gioia claims that KCWC purchased its real estate and investment securities with the anticipation that it would sell these assets when they were needed to self-finance KCWC's projects, Piazza disputes this and claims that these assets were purchased as long term investments for KCWC's shareholders. Piazza also states that Gioia has failed to cite to any company project or capital investment which was directly funded by these proceeds of nearly \$1 million. He claims that Gioia used these funds to subsidize his excessive salary and lavish excessive company expenses which only benefitted him, rather than distributing them to the shareholders.

After Piazza's accountant, Mark Gottlieb, requested access to KCWC's books and records, Gioia claims that this was provided to him. However, according to Franca, Gioia and KCWC declined the request of Mr. Gottlieb, to complete a business valuation questionnaire and to be able to interview Gioia. She asserts that Gioia refused to turn over detailed and itemized expense reports, including KCWC's credit card statements, and that Gioia and KCWC stopped cooperating in providing access to KCWC's books and records when Mr. Gottlieb began uncovering facts that KCWC was permitting JDG and Vener to use KCWC's assets and resources.

In March 2015, Piazza learned that KCWC had agreed to sell its primary business location at 1200 Utica Avenue, where it had operated for a few decades, for the purchase price of \$2,300,000. At a February 22, 2013 annual meeting of the stockholders and

directors of KCWC, a vote to sell this property was taken over Franca's objection with Gioia and Alexandra voting in favor of this sale.

On April 23, 2015, Piazza filed his instant petition for corporate dissolution, including additional direct and derivative claims. Piazza also sought a preliminary injunction prohibiting any transfers of KCWC's assets, including the 1200 Utica Avenue property and the proceeds of any prior asset transfers outside of the ordinary course of its business.<sup>2</sup> Piazza's petition alleges ten causes of action.

Piazza's first cause of action against Gioia and KCWC seeks judicial dissolution pursuant to Business Corporation Law § 1104. He alleges that Gioia's actions, as the majority shareholder of KCWC, amount to illegal, fraudulent, and oppressive actions against him, and that Gioia engaged in the looting, wasting, or diversion of KCWC's assets for non-corporate purposes, and consented to and/or actively abetted such diversion for the benefit of JDG and his company, Veneer, a competitor of KCWC.

Piazza's second cause of action alleges a claim for common-law dissolution as against Gioia and KCWC. Piazza's third cause of action asserts a direct claim for breach of fiduciary duty, including breach of duties of care, loyalty, and disclosure against Gioia under Business

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<sup>2</sup>When this action was pending in the Supreme Court, Queens County, where it was commenced (prior to a change of venue to this court), Justice Duane A. Hart, on the record on April 29, 2015, had initially permitted this sale, but ordered \$1.5 million of the proceeds of such sale to be placed in escrow to prevent any dissipation of these funds. Subsequently, however, this sale fell through and was not consummated, rendering the issue of the preliminary injunction moot. While not ordering a restraint on all other assets or the alienation of assets outside of the ordinary course of business, Justice Hart informed Gioia's counsel to tell his client that alienating assets while this case was ongoing would not be advisable.

Corporation Law § 720 and the common law. Piazza's fourth cause of action against Gioia and JDG alleges a derivative claim for breach of fiduciary duty and usurpation of corporate opportunities/corporate waste, and requests disgorgement to KCWC in accordance with the "faithless servant" doctrine. Piazza's fifth cause of action against Gioia asserts a direct claim for unjust enrichment based upon Gioia's alleged receipt of an exorbitant salary, benefits, and perquisites at his expense. Specifically, Piazza alleges that Gioia, rather than distributing profits equitably to the shareholders or distributing the majority of the proceeds of the assets sold to the shareholders in accordance with their respective shares, Gioia used assets, which belonged to KCWC, to pay himself a disproportionate salary, leaving little left to be distributed as profits to the shareholders. Piazza's sixth cause of action asserts a derivative claim for unjust enrichment against JDG and Veneer based upon their alleged use of KCWC's assets, resources, and opportunities. Piazza's seventh cause of action alleges a direct claim for a constructive trust against Gioia. Piazza's eighth cause of action asserts a derivative claim for a constructive trust against JDG and Veneer. Piazza's ninth cause of action alleges a direct claim for an accounting against Gioia pursuant to Business Corporation Law § 720 and the common law. Piazza's tenth cause of action asserts a derivative claim for an accounting against Gioia and JDG.

On October 13, 2015, Gioia and KCWC's moved, by order to show cause, under motion sequence number three, for an order extending their time to elect to purchase Piazza's KCWC shares under Business Corporation Law § 1118 until 30 days after the court issues

its decision on their motion (under motion sequence number five) to dismiss Piazza's claims. That motion was granted by the court's order dated January 15, 2016.

On October 30, 2015, Gioia and KCWC filed their instant motion for an order dismissing the petition and requiring Piazza to sell his shares of KCWC to them pursuant to paragraph 2 of the shareholders' agreement. On the same date, JDG and Veneer moved to dismiss Piazza's fourth, sixth, eighth, and tenth causes of action against them, or to convert this special proceeding to a plenary action with respect to them.

## **Discussion**

### **Gioia and KCWC's Motion**

#### *The Shareholders' Agreement Buy-Out Provision*

Gioia and KCWC argue that the commencement of this proceeding triggered Piazza's obligation to sell his shares in accordance with paragraph 2 of the shareholders' agreement. They contend that the court must, therefore, require Piazza to sell his shares to them for the last stipulated value of these shares, which, they assert, is \$25,000 per share, as established at the November 28, 2007 shareholders' meeting.

It is true that shareholders may set forth, in a shareholders' agreement, that a judicial dissolution proceeding pursuant to Business Corporation Law § 1104-a "will be deemed a voluntary offer to sell, or fix 'fair value'," and such an agreement may be enforced (*Matter of Pace Photographers [Rosen]*, 71 NY2d 737, 747 [1988]; see also *Ferolito v Vultaggio*, 99 AD3d 19, 26 [1st Dept 2012]; *Matter of Doniger v Rye Psychiatric Hosp. Ctr.*, 122 AD2d

873, 877 [2d Dept 1986], *lv denied* 68 NY2d 611 [1986]). Thus, if a shareholders' agreement expressly provides that a dissolution proceeding under Business Corporation Law § 1104-a will trigger buy-out rights under the shareholders' agreement, the commencement of a dissolution proceeding will trigger these rights and the shareholders' shares will be valued in accordance with the terms of the shareholders' agreement (*see Matter of Johnsen v ACP Distrib., Inc.*, 31 AD3d 172, 178 [1st Dept 2006]).

However, a shareholders' agreement which fixes the terms of a sale which is “voluntarily sought and desired by a shareholder” is not controlling “when the sale is the result of claimed majority oppression or other wrongdoing--in effect, a forced buyout” (*Matter of Pace Photographers [Rosen]*, 71 NY2d at 747; *see also Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 75 [1984]; *Matter of Sands Point Land Co. v Rossmore*, 43 Misc 2d 368, 373 [Sup Ct, Nassau County 1964]).

In the seminal case of *Matter of Pace Photographers [Rosen]* (71 NY2d at 747 [emphasis added]), where the buy-out provisions of the shareholders' agreement at issue were explicitly limited to the desire of any party to “sell, hypothecate, transfer, *encumber or otherwise dispose of*” his shares, the Court of Appeals held that “a sale occasioned by [a Business Corporation Law §] 1104-a petition premised on abuse by the majority does not fall within the contemplation of this shareholders' agreement regarding a sale of stock by a shareholder to the corporation.”

Here, as in *Matter of Pace Photographers [Rosen]* (71 NY2d at 747), the buy-out provision set forth in paragraph 2 of the shareholders' agreement were limited to the desire of a shareholder to "encumber or dispose of" his stock of KCWC. Thus, this provision did not provide that a dissolution proceeding under Business Corporation Law § 1104-a would be deemed a voluntary offer to sell, nor did it fix fair value in the event of an election under Business Corporation Law § 1118. Rather, it contemplated a voluntary sale at the convenience of and for the benefit of the selling shareholder, and not a sale occasioned by a Business Corporation Law § 1104-a petition.

A dissolution proceeding pursuant to Business Corporation Law § 1104-a, is an involuntary transfer, as opposed to a voluntary sale (*see* Business Corporation Law § 1104-a [b]). Paragraph 2 of the shareholders' agreement does not prohibit involuntary transfers by the shareholders (*see Matter of Stevens v Allied Bldrs., Inc.*, 74 AD3d 1757, 1759 [4th Dept 2010]; *Matter of Williamson v Williamson, Picket, Gross*, 259 AD2d 362, 362 [1st Dept 1999]). Piazza's petition to dissolve the corporation does not constitute an attempt to "dispose of" his stock as that phrase is used in the shareholders' agreement (*see James Mirabito & Sons, Inc. v Mirabito*, 137 Misc 2d 972, 973-974 [Sup Ct, Chenango County 1986]).

The buy-out provision contained in paragraph 2 of the shareholders' agreement does not contain language which is broad enough to encompass dissolution proceedings (*see Matter of Pace Photographers [Rosen]*, 71 NY2d at 747-748; *Matter of Stevens*, 74 AD3d

at 1759). Indeed, it contains the same language as found not to encompass a Business Corporation Law § 1104-a dissolution proceeding by the Court of Appeals in *Matter of Pace Photographers [Rosen]* (71 NY2d at 747-748). Thus, paragraph 2 of the shareholders' agreement is wholly inapplicable to this dissolution proceeding pursuant to Business Corporation Law § 1104-a, and the commencement of this dissolution proceeding did not trigger this buy-out provision of the shareholders' agreement (*see Matter of Stevens*, 74 AD3d at 1759).

The cases relied upon by Gioia and KCWC are readily distinguishable from the case at bar. In *Matter of Doniger* (122 AD2d at 877 [emphasis added]), the Appellate Division, Second Department, found that the buy-out provision in the shareholders' agreement in that proceeding was clear and unambiguous on its face, and that the language employed, which provided that "the shares must be offered following 'any proposed passage or disposition of shares whatsoever, *including but not limited to* . . . sale, delivery, assignment, gift, exchange, transfer [or] distribution', negate[d] any inference that the parties intended to exclude any possible method whereby their ownership interests would be affected, including a proceeding for judicial dissolution." It specifically held that the examples following the words "including but not limited to" were illustrative only, and did "not limit the broad scope of the terms employed" (*id.*). Thus, the Appellate Division, Second Department, in *Matter of Doniger* (122 AD2d at 877), interpreting the language of the shareholders' agreement broadly, found that the shareholders must have intended that the commencement of a

dissolution proceeding would be a triggering event, in which the buy-out provisions of the shareholders' agreement would apply.

In *Matter of Johnsen* (31 AD3d at 178 [emphasis added]), the buy-out provision of the shareholders' agreement provided that "no Stockholder shall at any time during the term of this Agreement donate, hypothecate, pledge, transfer or otherwise dispose of his Stock *in any manner whatsoever*, without first offering the same for sale first to the Company, and if the Company does not wish to purchase same, then to the Remaining Stockholders." The Appellate Division, First Department, in *Matter of Johnsen* (31 AD3d at 178), ruled that since the parties "chose the expansive language 'in any manner whatsoever' in defining the circumstances that would trigger a sale of shares under the terms of the stockholders' agreement . . . the parties clearly intended to cover the broadest spectrum of events that would trigger the buyout provisions of their agreement."

In *Matter of El-Roh Realty Corp.* (48 AD3d 1190, 1191 [4th Dept 2008] [emphasis added]), the shareholders' agreement broadly "prohibited the transfer of any shares, 'including, without limitation, transfers that are voluntary, *involuntary*, by operation of law or with or without valuable consideration.'" The Appellate Division, Fourth Department, in *Matter of El-Roh Realty Corp.* (48 AD3d at 1191), held that the commencement by the petitioner therein of a dissolution proceeding pursuant to Business Corporation Law § 1104 triggered that unambiguous provision.

Here, paragraph 2 of the shareholders' agreement is not so broadly worded and does not contain such inclusive sweeping language as the shareholders' agreements at issue in *Matter of Doniger*, *Matter of Johnsen*, and *Matter of El-Roh Realty Corp.* Moreover, *Matter of Doniger*, *Matter of Johnsen*, and *Matter of El-Roh Realty Corp.* were each dissolution proceedings brought pursuant to Business Corporation Law § 1104, as opposed to this dissolution proceeding brought pursuant to Business Corporation Law § 1104-a. The crucial distinction between these two types of proceedings is that dissolution may be sought under Business Corporation Law § 1104 where there is corporate deadlock, whereas Business Corporation Law § 1104-a "was adopted in order to provide a remedy to minority shareholders who have suffered abuse at the hands of the majority and lacked a means for salvaging the value of their investment." It has been observed that it is particularly important that there be specific words to explicitly spell out that the buyout will be triggered by the commencement of a Business Corporation Law § 1104-a proceeding since "in cases involving oppressive conduct or corporate waste or looting . . . the minority [shareholder] may be deterred from seeking judicial redress by the prospect that the mere act of seeking relief from a court will mandate that the minority [shareholder] sell out at a heavily discounted price" (*Matter of Piekos*, 28 Misc 3d 1220[A], 2010 NY Slip Op 51408[U], \*19-20 [Sup Ct, Westchester County 2010]). Thus, based upon the language of the shareholders' agreement, the court concludes that the commencement of this dissolution proceeding did not

trigger the buy-out provision of paragraph 2 and Gioia and KCWC are not entitled to an order directing Piazza to sell his KCWC shares to them in accordance with this provision.

*Fair Return on Investment*

Gioia and KCWC further argue that the court cannot order dissolution because Piazza agreed in paragraph 2 of the shareholders' agreement that the last stipulated price provided a fair return on his investment. They cite to *Matter of Harris (Daniels Agency)* (118 AD2d 646, 647 [2d Dept 1986]), in which the Appellate Division, Second Department, held that since the petitioner therein could obtain a fair return on his investment pursuant to the buy-out provisions of the shareholders' agreement, the Supreme Court, Dutchess County, did not abuse its discretion in declining to order the involuntary dissolution of the respondent corporation. Here, however, as previously noted, the language of the shareholders' agreement does not mandate that Piazza must sell his shares to Gioia or KCWC pursuant to the terms of paragraph 2. Moreover, based upon the parties' submissions, including the value of the shares espoused by Gioia at the February 22, 2013 and June 9, 2009 meetings of directors and shareholders and Gioia's assertion that KCWC's average gross profit was 15.13%, it has not been established that the stipulated price of \$25,000 per share from November 28, 2007, over eight years ago, would provide Piazza with a fair return on his investment.

Gioia and KCWC's reliance upon *Matter of Brach (88-15 Executive Arms Realty Corp.)* (135 AD2d 711, 712 [2d Dept 1987], *lv denied* 73 NY2d 701 [1988]) is also

misplaced, since the petition therein merely set forth that the petitioner was dissatisfied with the management of the corporation, and did not support a finding of oppressive action by the majority shareholders which substantially defeated his reasonable expectations, nor did the factual allegations in the petition allege that the corporation's capital was being wasted or looted by the other shareholders for their own enrichment, or that the corporation's existence was being continued solely for their benefit at the expense of the petitioner. In addition, it was established that the shareholders' agreement therein provided a procedure for the buy-out of a dissatisfied shareholder, which provided the petitioner with a fair return on his investment (*Id.* at 713). Here, in contrast, Piazza has set forth specific allegations to support his petition pursuant to Business Corporation Law § 1104-a, and the buy-out provision of the shareholders' agreement does not apply to this dissolution proceeding, nor has it been shown that it would provide Piazza with a fair return on his investment.

While pursuant to Business Corporation Law § 1104-a (b) (1), “[t]he court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account . . . [w]hether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment,” here, Piazza has raised issues of dissipation of corporate assets, corporate waste, diversion of corporate opportunities, overcompensation, and excessive expense spending. The conflicting affidavits submitted by the parties raise questions of fact regarding the merits of the petition and the appropriate remedy, and a hearing on the allegations is required before

a remedy can be fashioned (*see* Business Corporation Law § 1109; *Matter of Steinberg [Cross Country Paper Prods. Corp.]*, 249 AD2d 551, 552 [2d Dept 1998]; *Matter of Kournianos [H.M.G., Inc.]*, 175 AD2d 129, 130 [2d Dept 1991]; *Matter of MacDougall [Manhattan Ad Hoc Housewares]*, 150 AD2d 160, 161 [1st Dept 1989]; *Matter of Rosen [Hoftella Enters.]*, 102 AD2d 855, 855 [2d Dept 1984]). As set forth above, the court has afforded Gioia and KCWC additional time within which to make an election to purchase Piazza's shares of stock pursuant to Business Corporation Law § 1118 (a) (*see Matter of Steinberg [Cross Country Paper Prods. Corp.]*, 249 AD2d at 553). If Gioia and KCWC so elect, pursuant to Business Corporation Law § 1118; the dissolution proceeding shall be stayed so that the court may determine the fair value of Piazza's shares "as of the day prior to the date on which such petition was filed . . . giving effect to any adjustment or surcharge found to be appropriate . . . under section 1104-a" (Business Corporation Law § 1118 [b]). Pursuant to Business Corporation Law § 1104-a (d), "[t]he court may order stock valuations be adjusted and may provide for a surcharge upon the directors or those in control of the corporation upon a finding of wilful or reckless dissipation or transfer of assets or corporate property without just or adequate compensation therefor."

#### *Entitlement to Dissolution*

Gioia and KCWC further argue that even if the court does not direct the sale of Piazza's shares under the shareholders' agreement, it should still dismiss the petition on the ground that Piazza is not entitled to a dissolution under Business Corporation Law § 1104-a

or the common-law. They assert that although the petition alleges a number of instances of oppression and looting, these allegations are untrue.

Piazza, in his first cause of action, alleges a claim for judicial dissolution under Business Corporation Law § 1104-a. Pursuant to Business Corporation Law § 1104-a, “[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . may present a petition of dissolution on . . . the . . . grounds [that] . . . [t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders” and/or “[t]he property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.”

Piazza’s second cause of action alleges a claim for common-law dissolution. “A claim for common-law dissolution is properly stated where it is alleged with sufficient factual detail that the shareholders in control have been looting the company’s assets at the expense of the minority shareholders, ‘continuing the corporation’s existence . . . for the sole purpose of benefitting those in control,’ and have sought ‘to force and coerce [the minority shareholders] to sell and sacrifice their holdings to those in control’” (*Ferolito*, 99 AD3d at 28, quoting *Leibert v Clapp*, 13 NY2d 313, 315-316 [1963]). Allegations of looting and oppression are sufficient to state a claim for common-law dissolution (*see Ferolito*, 99 AD3d at 28-29). “While the legislature supplemented this principle of judicially ordered equitable dissolution of a corporation by passing Business Corporation Law § 1104-a, it does not

appear that it intended Business Corporation Law § 1104-a to be the exclusive remedy for aggrieved shareholders . . . and the courts continue to recognize the common-law cause of action” (*Id.* at 28).<sup>3</sup>

A minority shareholder is subject to oppression when the majority shareholder’s conduct “defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner’s decision to join the venture” (*Matter of Kemp & Beatley [Gardstein]*, 64 NY2d at 73). Oppressive conduct may be found where “a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus,” or “corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on [his or her] investment” (*Petition for Dissolution of Affiliated Agency, Inc. v Duggan*, 2011 NY Slip Op 33667[U], \*4 [Sup Ct, Nassau County 2011]).

Here, Piazza alleges that he has been excluded from participation in corporate affairs. Specifically, Piazza cites to Gioia’s appointment of his young adult children (i.e., JDG and Alexandra) to KCWC’s board over his objection, his sale of the 1222 Utica Avenue property without notice to him or a board vote, his sale of the 1358 Utica Avenue property over his objection, his decision to move KCWC’s headquarters without notice to him, the placement of KCWC’s headquarters building on the market without notice to him, his refusal to answer

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<sup>3</sup>Common-law dissolution is generally utilized by minority shareholders holding less than 20% of the corporation’s shares, who are unable to avail themselves of Business Corporation Law § 1104-a. Here, as noted above, Piazza is a 40% shareholder of KCWC.

questions about its relocation or sale until after a vote was taken, and a false representation by him that Franca was unable to use his power of attorney and voting proxy when she and members of the Gioia family had done so for years.

With respect to changing policies to prevent a minority shareholder from receiving a reasonable return, Piazza has pleaded that Gioia has sold four parcels of real estate and an interest in Superior Scaffolding, which yielded millions of dollars, but which resulted in no dividends or other remuneration being paid to him. He alleges that rather than having dividends paid, Gioia disproportionately paid himself a salary totaling more than \$5 million over 10 years and gave himself a luxury car. An attempt to squeeze-out a petitioner by offering him no return on his investment and increasing other executive compensation has been held to constitute oppressive conduct within the meaning of Business Corporation Law § 1104-a (see *Matter of Kemp & Beatley [Gardstein]*, 64 NY2d at 74-75; *Matter of Parveen*, 259 AD2d 389, 391 [1st Dept 1999]; *Matter of Digeser v Flach*, 49 Misc 3d 1213[A], 2015 NY Slip Op 51609[U], \*5-6 [Albany County 2015]).

Gioia argues that Piazza has not alleged that this is a changed policy. However, he does not dispute that there were no such previous sales of substantial real estate without the payment of dividends or that the amount of salary he has been receiving is vastly more than previous salaries paid to Piazza and Enzo. While Gioia asserts that Piazza is receiving a salary as a retired employee which is more than what was paid to Enzo, he does not dispute

that while Enzo's salary was 80% of what had been then paid to him, Piazza's average salary is 8% of his average salary.

Piazza has also alleged that KCWC's property and assets are being looted, wasted, or diverted for non-corporate purposes by Gioia. Specifically, he alleges, in detail, instances of claimed misappropriation of assets and corporate waste. Gioia concedes that KCWC sold a total of nearly \$1,000,000 of real estate holdings in the months prior to Piazza's filing of his petition, that he received at least \$250,000 from KCWC's sale of its interest in Superior Scaffolding through 2013, and that KCWC liquidated approximately \$650,000 in securities during a three-year period. In addition, Gioia attempted to sell KCWC's former headquarters for \$2,300,000. While Gioia asserts that these long held real estate properties had been purchased in order to liquidate them and to reinvest the liquidate funds, he has not established this, and this is vehemently disputed by Piazza.

Piazza has also alleged that there has been a usurpation of corporate opportunities by KCWC's gifting of its opportunities and resources to Gioia's son, JDG, and JDG's company, Veneer. Gioia and KCWC argue that none of KCWC's corporate opportunities could have been diverted to Veneer because KCWC is a union company which cannot perform non-union work, whereas Veneer does exclusively non-union work. Gioia, however, does not deny that JDG formed and operated Veneer during two years while he was a director of KCWC, with Gioia's assistance and that Gioia provided JDG and Veneer with the use of KCWC's assets, including its real estate, employees, vehicles, and equipment.

Thus, the court finds that Piazza has adequately alleged a claim for dissolution sufficient to withstand KCWC and Gioia's dismissal motion. Consequently, such motion, insofar as it seeks to dismiss Piazza's claims for dissolution under Business Corporation Law § 1104-a and under the common law, must be denied.

*Piazza's Direct and Derivative Claims*

Gioia and KCWC argue that all of Piazza's non-dissolution claims should be dismissed because the petition mixes personal and derivative claims. It has been held that where the allegations of a complaint confuse a shareholder's derivative and individual rights, dismissal is warranted (*see Abrams v Donati*, 66 NY2d 951, 953 [1985], *rearg denied* 67 NY2d 758 [1986]; *Yudell v Gilbert*, 99 AD3d 108, 115 [1st Dept 2012]; *Corso v Byron*, 11 Misc 3d 1072[A], 2006 NY Slip Op 50520[U]. \*4 [Sup Ct, Suffolk County 2006]). However, "a complaint should be dismissed only where there is a 'mingling of derivative claims and individual claims' such that the court cannot untangle the 'confusing hodge-podge' of direct and derivative claims" (*Zelouf v Zelouf*, 2013 NY Slip Op 33906[U], \*2 [Sup Ct, NY County 2013], quoting *Barbour v Knecht*, 296 AD2d 218, 228 [1st Dept 2002]). Here, the petition does not mix these claims, but states them as separate causes of action, designating them as direct and derivative causes of action. Thus, since Piazza has not confused individual and derivative claims within each cause of action, dismissal of the petition on this basis must be denied (*see Baliotti v Walkes*, 134 AD2d 554, 555 [2d Dept 1987]).

Gioia and KCWC further contend, however, that dismissal of Piazza direct claims is required because they plead wrongs to KCWC only, for which he may sue derivatively, but not individually. These direct claims consist of Piazza's third cause of action for breach of fiduciary duty, his fifth cause of action for unjust enrichment, his seventh cause of action for a constructive trust, and his ninth cause of action for an accounting.

It is well established that a shareholder lacks standing to pursue a direct cause of action to redress wrongs suffered by the corporation; rather such claims must be asserted derivatively, for the benefit of the corporation (*see Abrams*, 66 NY2d at 953; *Serino v Lipper*, 123 AD3d 34, 39 [1st Dept 2014]). "This is true notwithstanding that the wrongful acts may have diminished the value of the shares of the corporation" (*Serino*, 123 AD3d at 39; *see also Citibank v Plapinger*, 66 NY2d 90, 93 n [1985], *rearg denied* 67 NY2d 647 [1986]). A limited exception to this rule exists, which allows for direct claims to be asserted against a corporation where the shareholder alleges the breach of a duty owed directly to him or her, which is independent of any duty owed to the corporation (*see Abrams*, 66 NY2d at 953; *Serino*, 123 AD3d at 39).

Piazza's third cause of action for breach of fiduciary duty pursuant to Business Corporation Law § 720 and the common law alleges loss or waste of corporate assets, unlawful transfer of corporate assets, and violation of duties by Gioia, which deprived Piazza of monies to which he was entitled as a 40% shareholder of KCWC. However, "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment,

without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually” (*Abrams*, 66 NY2d at 953; *see also O’Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 281-282 [1st Dept 2007]; *Wolf v Rand*, 258 AD2d 401, 403 [1st Dept 1999]; *Elenson v Wax*, 215 AD2d 429, 429 [2d Dept 1995]; *Cortes v 3A N. Park Ave Rest Corp.*, 46 Misc 3d 670, 695 [Sup Ct, Kings County 2014]). Piazza has not alleged any breach of an independent duty owed to him by Gioia separate from his claims of mismanagement and the diversion of assets from KCWC (*see Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 225 [1st Dept 1996]). Furthermore, while Piazza’s third cause of action cites to Business Corporation Law § 720, “a claim under Business Corporation Law § 720 may be sustained only as a derivative action” (*Berardi v Berardi*, 108 AD3d 406, 407 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014]; *see also Romanoff v Superior Career Inst.*, 69 AD2d 856, 856 [2d Dept 1979]). Thus, Piazza’s third cause of action for Gioia’s breach of fiduciary duty, brought in his individual capacity, must be dismissed (*see CPLR 3211 [a] [3], [7]*; *Cortes*, 46 Misc 3d at 695-696).

Piazza’s fifth cause of action alleging a direct claim for unjust enrichment against Gioia asserts that rather than distributing profits, Gioia used the proceeds of the sales of KCWC’s assets to pay himself a disproportionate salary. The alleged diversion of KCWC’s corporate assets by Gioia for his own profit, however, alleges a derivative claim, rather than a direct claim, and, as such, this cause of action must be dismissed (*see CPLR 3211 [a] [3], [7]*; *Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386, 392 [1989]).

Piazza's seventh cause of action alleging a direct claim for a constructive trust against Gioia, is solely a derivative claim since any monies recouped would benefit KCWC, rather than him and no direct independent claim has been alleged by Piazza (*see Yudell*, 99 AD3d at 114). This claim must, therefore, be dismissed (*see CPLR 3211 [a] [3], [7]*).

Piazza's ninth cause of action alleging a direct claim for an accounting against Gioia pursuant to Business Corporation Law § 720 and the common law also fails because Piazza, by his allegations, alleges harm to KCWC, as opposed to him, as an individual. Therefore, Piazza's accounting cause of action is only properly asserted as a derivative claim, and not an individual one (*see Berardi*, 108 AD3d at 407; *Romanoff*, 69 AD2d at 856). Consequently, this cause of action must be dismissed (*see CPLR 3211 [a] [3], [7]*).

Gioia and KCWC also seek dismissal of Piazza's claim for punitive damages. In his petition, Piazza seeks an award of punitive damages based on Gioia's alleged long standing, intentional, and egregious actions toward him and self-dealing of KCWC's assets. Piazza, however, cannot recover punitive damages under the facts alleged in his petition since Gioia's alleged conduct does not involve "a fraud evincing a high degree of moral turpitude" or demonstrate "such wanton dishonesty as to imply a criminal indifference to civil obligations," nor was such conduct "aimed at the public generally" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994] [internal quotation marks omitted]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]). Piazza's demand for punitive damages must, therefore, be dismissed.

## JDG and Veneer's Motion

### *The Shareholders' Agreement's Buy-Out Provision*

JDG and Veneer argue that the buy-out provision of the shareholders' agreement is controlling, and that, with his shares subject to a mandatory buy-out, Piazza will not continue to be a shareholder and lacks standing to bring a derivative action against them. This argument is rejected since, as discussed above, the buy-out provision of the shareholders' agreement is inapplicable in this dissolution proceeding. Thus, inasmuch as Piazza will remain a shareholder until dissolution or until the purchase of his shares pursuant to Business Corporation Law § 1118 if Gioia and KCWC elect to do so, Piazza has standing to bring his derivative claims.

### *Piazza's Derivative Claims Against JDG and Veneer*

JDG and Veneer argue that Piazza's derivative claims against them should be dismissed because his allegations mix personal and derivative claims. This argument is devoid of merit. Piazza's fourth, sixth, eighth, and tenth causes of action are derivative claims only, which allege wrongdoing against KCWC and specify that they seek relief "to the extent that the actions alleged resulted in harm to KCWC as a whole, as opposed to Piazza, individually."

JDG and Veneer further argue that because Piazza's allegations, in his fourth cause of action, make reference to the manifest unfairness to him and that the harvesting of millions of dollars of KCWC's assets were without any financial benefit to him, it constitutes a direct

claim, and, therefore, must be dismissed as improperly mixing a direct claim within this derivative claim. This argument is rejected since these allegations refer to the unfairness and lack of financial benefit to him as a stockholder of KCWC, and, thus, they are derivative in nature.

#### *Conversion to Plenary Action*

JDG and Veneer argue that they will be prejudiced if they are required to answer and litigate Piazza's derivative claims against them within this dissolution proceeding. They claim that there will be an accelerated schedule and they will not have the benefit of full and complete discovery. However, while this is a hybrid action and proceeding, in which Piazza has joined derivative claims in his dissolution proceeding, even in special proceedings, CPLR 408 permits disclosure with leave of the court. There is no reason why the parties cannot be afforded any necessary discovery within the context of this proceeding.

A dissolution claim may be joined with non-dissolution claims; "there is no bar to a shareholder pursuing both dissolution and derivative actions simultaneously" (*Slade v Endervelt*, 174 AD2d 389, 390 [1st Dept 1991]; see also *Matter of Tosca Brick Oven Bread [Lubena]*, 243 AD2d 416, 416 [1st Dept 1997]; *Edmonds v Amnews Corp.*, 224 AD2d 358, 358 [1st Dept 1996]; *Maxon v Mirror Show Mgt., Inc.*, 7 Misc 3d 1015[A], 2005 NY Slip Op 50601[U], \*2 [Sup Ct, Monroe County 2005]). Moreover, since the resolution of the non-dissolution claims may affect the "fair value" to be determined in valuing Piazza's shares in the event that Gioia and KCWC exercise their rights under Business Corporation

Law 1118, such non-dissolution claims, and valuation proceeding are “inextricably intertwined,” and are appropriately ordered to proceed in tandem before the same court,” (*Ferolito*, 99 AD3d at 29; *see also Edmonds*, 224 AD2d at 358). Thus, the court does not find it necessary or appropriate to convert any claims herein to a plenary action or to order these claims to proceed separately from the dissolution proceeding.

### Conclusion

Accordingly, Gioia and KCWC’s motion is granted to the extent that Piazza’s third, fifth, seventh, and ninth causes of action are dismissed, as well as his claim for punitive damages, and Gioia and KCWC’s motion is otherwise denied. JDG and Veneer’s motion is denied in its entirety. Gioia and KCWC are afforded 30 days from the receipt of this decision and order with notice of entry to elect with the requisite formality to purchase Piazza’s shares, pursuant to Business Corporation Law § 1118 (a), at their fair value upon such terms and conditions as may be approved by the court. During this 30-day period, the dissolution proceeding is stayed. If no election occurs within 30 days, the dissolution proceeding shall continue. If an election occurs, the dissolution proceeding shall be stayed and a determination of the fair value of Piazza’s shares shall be made pursuant to Business Corporation Law § 1118 (b).

This constitutes the decision and order of the court.

E N T E R



J. S. C.

HON. LAWRENCE KNIPEL