

**Blank v Eckert**

2023 NY Slip Op 30085(U)

January 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 504430/20

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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SIDNEY BLANK, LEONARD ECKERT, STEVEN  
ECKERT, and derivatively on behalf of all  
shareholders SHELL ENTERPRISES INC., AND  
SHELL LANES INC.,

Petitioners, Decision and order  
Index No. 504430/20

- against -

FRED ECKERT,

Respondent,

- against -

January 11, 2023

SHELL ENTERPRISES INC., AND SHELL LANES INC.,  
Nominal Respondents

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PRESENT: HON. LEON RUCHELSMAN

The petitioner has moved pursuant to CPLR §3212 seeking summary judgement. The respondent has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, the petitioner Sidney Blank is a fifty percent owner of Shell Enterprises Inc., and Shell Lanes Inc. Petitioners Leonard and Steven Eckert each own twelve and a half percent of the corporations and the respondent Fred Eckert owns twenty five percent of the corporations. The corporations were formed in 1959. Shell Enterprises owns the property and Shell Lanes is a bowling alley at the location. According to the Verified Petition, the respondent has been in the exclusive possession of the books and records of the corporations and has

exclusively managed the corporation without the involvement of any of the other shareholders since at least 2015. The Petition alleges various improprieties including breach of fiduciary duty, waste, mismanagement, unjust enrichment, breach of contract and other claims. The petitioner now moves seeking summary judgement arguing there are no questions of fact the petitioner is entitled to judgement regarding the first, second, third, fourth, fifth and sixth causes of action contained within the petition. Specifically, these allegations concern an accounting, the fact the respondent breached his fiduciary duty, committed waste, mismanagement and breach of contract. Further, there is a claim for unjust enrichment. The basis for the relief sought is the respondent's failure to appropriately manage the corporation as required. The respondent argues there are questions of fact which foreclose a summary determination at this time.

#### Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021,

136 NYS3d 324 [2d Dept., 2021).

The petitioners assert that there are no questions of fact that respondent acted improperly, failed to pay various taxes and failed to exercise diligence in managing the corporation. The chief opposition presented is that the petitioners also maintained a duty to insure the financial stability of the corporation and by relying upon the respondent they must share in any blame and a jury should evaluate any such blame.

Pursuant to the operating agreement the respondent was solely responsible for the management and operation of the corporation. The dispute among the parties began in 2015 when the respondent refused to share any of the books and records with the remaining shareholders, petitioners herein. Thus, on September 7, 2016 and November 8, 2016 petitioners served a demand for books and records pursuant to BCL §624. That led to an action commenced in 2018 and this current action. As noted, the respondent asserts the petitioners are potentially liable for failing to inquire as to the respondent's malfeasance. Specifically, the respondent argues that "the failure of the directors (i.e., the Petitioners) to make any inquiry and just sit and collect their income, sets an equal amount (if not more) liability upon their shoulders" (see, Affirmation in Opposition, ¶10 [NYSCEF Doc. No. 152]). However, during the period of the respondent's alleged malfeasance the petitioners directly and

pointedly sought information from the respondent about the management of the corporation. It is not accurate to characterize the petitioners as uninterested directors who failed to inquire about the management of the corporation. On the contrary, since 2015 the petitioners have been actively involved in all of the operations of the corporation. Thus, the petitioners cannot possibly share any responsibility for the failure to pay either payroll taxes or property taxes since the respondent was solely responsible for those payments.

Considering the specific allegations and causes of action, first, it is well settled that "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d 261, 503 NYS2d 381 [2d Dept., 1986]). There are no questions of fact the respondent is required to provide an accounting.

Further, concerning breach of contract, the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1<sup>st</sup> Dept., 2010]). The petitioners have presented evidence the respondent breached the operating agreement by failing to fulfill his duties pursuant to that agreement. There are no questions of

fact in this regard.

Next, corporate waste is the diversion of corporate assets for improper or unnecessary purposes (Aronoff v. Albanese, 85 AD2d 3, 446 NYS2d 368 [2d Dept., 1982]). Again, there are no questions of fact the respondent acted and committed corporate waste.

The next cause of action is unjust enrichment. The elements of a cause of action to recover for unjust enrichment are that "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, GFRE, Inc., v. U.S. Bank, N.A., 130 AD3d 569, 13 NYS3d 452 [2d Dept., 2015]). Thus, "the essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, Paramount Film Distributing Corp., 30 NY2d 415, 344 NYS2d 388 [1972]). Again, there are no questions of fact the respondent is liable for unjust enrichment.

It is well settled that when a claim for breach of a fiduciary duty is merely duplicative of a breach of contract claim where they are based on the same facts and seek the same damage then the breach of fiduciary claim cannot stand (Pacella v. Town of Newburgh Volunteer Ambulance Corps. Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). In this case the cause of

action alleging any breach of a fiduciary duty is identical to the breach of contract claim, namely that the respondent failed to honor the terms of the operating agreement entered into between the parties. Consequently, the motion seeking summary judgement regarding the breach of fiduciary duty claim is denied.

Lastly, the fifth count of the petition contains a cause of action called gross mismanagement. That allegation is difficult to quantify and in any event is already subsumed within the breach of contract claim and any motion seeking summary judgement of this claim is denied.

Therefore, based on the foregoing, the motion seeking summary judgement is granted concerning counts one, three, four and six.

The extent of damages resulting from all allegations cannot be summarily determined and the parties may proceed with a trial on the issue of damages. Further, the parties may engage in discovery in preparation for such trial.

So ordered.

ENTER:

DATED: January 11, 2023  
Brooklyn N.Y.



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Hon. Leon Ruchelsman  
JSC