

Grgurev v Licul

2023 NY Slip Op 32572(U)

July 26, 2023

Supreme Court, New York County

Docket Number: Index No. 157551/2019

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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FERDO GRGUREV, OWNING 50% OF ALL
OUTSTANDING SHARES OF OCINOMLED, LTD., AND
MICHELLE GRGUREV AND ROBERT GRGUREV, EACH
OWNING 25% OF ALL OUTSTANDING SHARES OF
OCINOMLED, LTD.,

Plaintiffs/Petitioners,

- v -

MILAN LICUL INDIVIDUALLY, BRANKO TURCINOVIC
INDIVIDUALLY, OCINOMLED, LTD., ANTHONY A.
ANTONELLO, THE HARTFORD LIFE INSURANCE
COMPANY,

Defendants/Respondents.

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INDEX NO. 157551/2019
MOTION DATE 03/06/2023,
03/13/2023
MOTION SEQ. NO. 020 021

**DECISION + ORDER ON
ACCOUNTING AND
RELATED MOTIONS**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 020) 517, 518, 519, 577,
587, 588, 648, 649, 650

were read on this motion to STRIKE EXPERT TESTIMONY.

The following e-filed documents, listed by NYSCEF document number (Motion 021) 589, 590, 600
were read on this motion to STRIKE EXPERT TESTIMONY.

Ocinomled, Ltd. (“Ocinomled”), the corporate owner of the iconic Delmonico’s
Steakhouse, was equitably dissolved by a prior order of this Court (NYSCEF 399). Prior to its
dissolution, Ocinomled was exclusively managed and controlled by Respondents Milan Licul
and Branko Turcinovic (“Respondents”), to the exclusion of the Petitioners Ferdo and Omer
Grgurev, who were each 25 percent shareholders. On March 29, 2022, the First Department
affirmed the equitable dissolution of Ocinomled (and a substantial monetary payment to
Petitioners, who were also given control over Delmonico’s) but held that Petitioners were also
“entitled to an accounting for Delmonico’s for 2011 to 2019” and directed Respondents to

produce such an accounting (*Grgurev v Licul*, 203 AD3d 624, 625 [1st Dept 2022], *lv to appeal dismissed*, 38 NY3d 1171 [2022]).

On December 21, 2022, this Court conducted a hearing to determine the adequacy of the accounting produced by Respondents and the damages sought by Petitioners as a result of Respondents' purported misappropriation of profits. At the hearing, Petitioners' counsel moved to strike the expert witness report and testimony of Respondents' expert witness, Julie Saitz (NYSCEF 507 ["Tr."]) at 48:23-49:10). The Court deferred ruling on that motion until after testimony was heard (*id.* at 49:11-15). Following the hearing, Petitioners renewed their motion to strike (Mot. Seq. 020 and 021).

Based on the evidence presented at the hearing, as well as the record in this case from its inception, the Court denies Petitioners' motions to strike Respondents' expert testimony. The Court further finds that while Respondents' accounting is far from perfect, owing in no small part to the lack of sophistication in the financial accounting systems that were in place at Delmonico's during the relevant period, Respondents have adequately demonstrated that the amounts questioned by Petitioners (mainly millions of dollars in payments purportedly for employee tips and vendor expenses over a number of years) were expenses of the business, and not the widespread theft theorized by Petitioners. The Court concludes that the substantial financial benefits provided to Petitioners via the equitable dissolution is the final and appropriate resolution of this matter.

DISCUSSION

"An equitable accounting involves a remedy designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered

funds in his or her possession” (*Hall v Louis*, 184 AD3d 437, 438-439 [1st Dept 2020] [internal quotation marks omitted]; *Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011]). The party submitting the accounting has the burden of proving that he fully accounted for that which is entrusted, and while the objecting parties bear the burden of “coming forward with evidence to establish that the account is inaccurate or incomplete, upon satisfaction of that showing[,] the accounting party must prove, by a fair preponderance of the evidence, that his or her account is accurate and complete” (*Donati v Marinelli Const. Corp.*, 21 AD3d 440, 441 [2d Dept 2005]). “Conjecture and suspicion are insufficient” (*Matter of Salvati*, 75 Misc 3d 1231(A) [Sur Ct, Westchester County 2022]). Ultimately, “[t]he calculation of an equitable accounting is, within broad limits, committed to the [trial] court’s discretion” (*Soley v Wasserman*, 639 Fed Appx 670, 677 [2d Cir 2016]).

Here, Respondents submitted the Expert Report of Juli Saitz (Jul. 19, 2022), who previously issued two reports in this matter (Sept. 21, 2020 and Sept. 30, 2020). Saitz found, among other things, that the books and records were antiquated, and the systems in place in the ordinary course of business for keeping track of their finances were not robust (Tr. at 13:7-19). Nevertheless, Saitz was able to provide analysis of the financial records, capital accounts, tax returns, and bank records such that she could conclude that the finances tied such that, in her professional opinion, nothing material was unaccounted for (*see* Saitz Report ¶¶40–49, 103–114, 115–127). Among other things, she assessed the reasonableness of the employee “tip” charges against the restaurant’s revenues (Tr. at 31:5–17; Tr. at 34:16–24; Tr. at 35:3–5), conducted a common-size analysis (Saitz Report ¶¶117–120; Tr. at 23:20–25; 24:1–12), found that Delmonico’s cost of goods was fairly consistent over time as a percentage of revenue (*id.*; Tr. at 35:10–15), and conducted a capacity analysis (Saitz Report ¶¶121–127; Tr. at 24:13–25; 25:7–

11), each of which reasonably supported the conclusion that Delmonico's reported earnings and costs were not out of line with what would be expected for the normal operation of the business (Saitz Report ¶¶137–138). Although it would obviously be preferable that all businesses utilize robust methods to keep track of their finances in detail and in real time, the Court does not find that the failure to do so in this instance supports Petitioner's proposed finding of widespread theft. Accordingly, Petitioner's motions to strike Respondent's expert testimony are denied, and Respondent's accounting is accepted (*Soley*, 639 Fed Appx at 677 [“Even if there were gaps in [respondent's] documentation, we cannot say that this accounting was so deficient that it was error to approve it”]).

Petitioner's speculation that they are owed \$34,738,980.97, comprised of \$13,738,980.97 (which represents checks made out to cash, purportedly for employee tips) and \$21,000,000 in claimed vendor expenses is unavailing.¹ Petitioners submitted a Rebuttal Report by Michael J. Garibaldi (Sept. 28, 2022) (NYCEF 241 [“Garibaldi Report”]), who also previously issued two reports (NYSCEF 241 [Sept. 21, 2020] and NYSCEF 242 [Sept. 30, 2020]). Gardibaldi's Report states that in his professional opinion, “that to produce an ‘accounting’ for an enterprise means to provide a methodology and adequate evidence of the sort typically acceptable to accounting professionals” (Gardibaldi Report at 8). Although Garibaldi made various objections to Saitz's analysis, he did not offer any persuasive, evidence-based analysis in support of the damages amount sought by Petitioners. As previously noted, objections based on “[c]onjecture and suspicion are insufficient” (*Matter of Salvati*, 75 Misc 3d 1231(A)).

¹ Petitioners argue – without credible evidence – that Respondents are actually liable for \$70,140,833, but that they will not pursue an appeal if judgment is entered for just a *portion* of those funds, *i.e.* \$34,738,980.97 corresponding to the \$13,738,980.97 cash withdrawn from Delmonico's accounts, and \$21,000,000 in vendor expenses (NYSCEF 600 at 9).

Where courts choose to impose a surcharge against fiduciaries after an accounting, they look at expert testimony to help determine the appropriate amount (*Wang v Ke*, 77 AD3d 1113, 1115 [3d Dept 2010] [court reduced surcharged awarded at an accounting after looking the expert's testimony regarding an analysis of the gross revenue in comparison to profit margins, as well as reported credit card sales]; *Donati v Marinelli Const. Corp.*, 21 AD3d 440, 443 [2d Dept 2005] [finding that "the Supreme Court should have permitted the defendants to present expert evidence to estimate the fair value of the plaintiff's private use of the parking lot as well as the income generated by the parking lot during the period in question, taking into account its location, condition, and other relevant factors."]). Here, as noted, Petitioners' expert provides no basis on which to make a meaningful determination of a surcharge. Specifically, regarding the \$13.7 million in cash withdrawn by Respondents, the evidence showed that this amount (roughly 15 to 20 percent of revenue each year) was is consistent with the amount of tips that would be expected to be paid in a restaurant business like Delmonico's (Tr. at 31:5-17). Saitz further noted that this was explained in the RSZ Report, which found Respondents' practice lacked transparency but ultimately was "compliant." (Saitz Report ¶¶99–101; *see also* NYSCEF 240 at 6).

Further, Respondents' expert, as well as the Special Referee in the underlying dissolution, looked at the income generated by Delmonico's and the amount of cash tips paid to employees and found that this amount was reasonable for a restaurant in its location, size, etc (NYSCEF 234 ["Oct 2020 Report"] at 22). Petitioners fail to raise any persuasive objections to the methodology applied by Saitz to determine that the amount of cash tips paid to employees was reasonable, nor do Petitioners provide any competing analysis.

As to the challenged \$21 million in vendor expenses, as Saitz wrote in her September 30, 2020 report, “[o]ne way to understand if vendor payments are appropriate for a business is to compare the margins of the subject business to comparables” (NYSCEF 254 at ¶ 46). Saitz provided this data in her original report, (NYSCEF 253), and “illustrated that Delmonico’s generally outperformed full-service restaurants in the same revenue range” and that the “[t]he margins experienced by Delmonico’s would not be consistent with inappropriate or excessive vendor payments the margins achieved by Delmonico’s have been consistent over time” (NYSCEF 254 at ¶¶ 46–48). The Referee agreed, finding that Garibaldi’s claims on this issue were “estimates” and “not specific determinations” (Oct 2020 Report at ¶ 42). Saitz again noted in her 2022 accounting report that “there is nothing unusual about the expense patterns of Ocinomled” (Saitz Report at ¶¶ 119–120). Petitioners fail to raise any credible, evidence-based objections to the methodology applied by Saitz to determine if these expenses were appropriate, nor do Petitioners provide any competing analysis.

In sum, the Court does not find that the imposition of a surcharge is appropriate here. Petitioners’ assertion that millions of dollars of cash was diverted to Respondents is based on speculation (Tr. at 147:20-22), which is an insufficient basis to award Petitioners millions in damages.

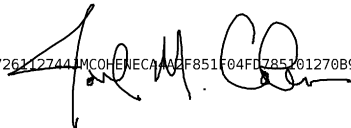
Nor does the Court find that any other remedy is required in the interests of justice (*Estate of Schnare*, 191 AD2d at 861). Petitioners were already awarded a remedy at law and equity—including a deficiency judgment of \$1,752,720.41, and forfeiture of Respondents’ ownership interests in Ocinomled, including certain rights to the use of Delmonico’s name and lease (NYSCEF 399). Having presided over this case through its many twists and turns over the

course of four years, the Court finds that Petitioners have received the full relief appropriate to achieve an equitable result based on the evidence in the record. Accordingly, it is

ORDERED the Petitioners' motions to strike Respondents' Expert Witness (Mot. Seq. 20 and 21) are **DENIED**; it is further

ORDERED and ADJUDGED that the accounting as submitted by Respondents is accepted, and the objections filed by Petitioners (and speculative claims for tens of millions of dollars in damages) are denied.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

7/26/2023
DATE

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: