SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

GREGORY KLEIN, D.M.D., individually and derivatively as shareholder of GALLOWAY DENTAL, P.C.,

Plaintiff,

v.

EDWIN WILEY, D.M.D., individually and as shareholder of GALLOWAY DENTAL, P.C., and SALLY WILEY, individually,

Defendants.

Index No. 650973 / 2017

Motion Seq. 23

Return Date: November 5, 2021

Hon. Craig Stephen Brown

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This case is a dispute between two dentists over the sale of a dental practice named Galloway Dental. The case was brought by Gregory Klein, former employee and minority shareholder, by way of a Verified Complaint, against Edwin Wiley, the founder of the practice, employer, majority shareholder and sole director. From the perspective of Edwin Wiley, this lawsuit is a baseless, greed-inspired personal attack on him and his family, made by a person to whom he provided a long career, a devoted clientele, every opportunity to purchase the practice on dear terms, and a new position for more money after Galloway's assets were sold. In addition to the "biting the hand that fed him" aspect to this case, the Verified Complaint has made the dispute even more personal and rancorous by asserting false claims and accusations against not only Edwin Wiley, but his wife Sally and his daughter, including the very serious and completely false claims that they committed federal crimes.

Notwithstanding the highly contested accusations made by Plaintiff, there exist certain undisputed, material facts which make the matter ripe for summary judgment dismissal pursuant to clear law. Specifically, Counts One through Seven Plaintiff's eight-count Verified Complaint assert derivative claims that are barred by New York's statutory "exclusivity" rule applicable to post-asset sale disputes, and which provides the exclusive remedy to consenting minority shareholders such as Plaintiff.

In the present matter, it undisputed that: (i) the company at issue sold its assets; (ii) Plaintiff was a minority shareholder; (iii) Plaintiff consented to the sale; (iv) Plaintiff failed to file the requisite action asserting his appraisal rights; and (v) Plaintiff

subsequently filed this lawsuit asserting derivative claims on behalf of the corporation. Based on these undisputed facts alone, all derivative claims asserted by Plaintiff in the Verified Complaint should be dismissed with prejudice.

Plaintiff's Verified Complaint should also be dismissed summarily because it is undisputed that Plaintiff demanded payment after the sale on a portion of his shares and was so paid. The law is clear that a partial sale of shares has the legal effect of making a Plaintiff a creditor on the value of remainder of the shares, no longer a minority shareholder and, therefore, no longer able to sue derivatively on behalf of the company.

The allegations of fraud are subject to summary dismissal for the additional reason that they are based exclusively on alleged representations to a third party— the Internal Revenue Service. The law is clear that alleged representations made not to a plaintiff, but instead to a non-party, are not a proper foundation for fraud claims and they should be dismissed accordingly. The final count of the Verified Complaint for an award of attorney fees to Plaintiff should also be dismissed summarily because, *inter alia*, it is based on a "prevailing party" clause of a contract, and Plaintiff has asserted no underlying breach of contract claim.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. Former minority shareholder / plaintiff Dr. Gregory Klein held 150 shares of Galloway Dental, P.C. ("Galloway"), a New York professional corporation operating as a dental practice in Warwick. *See* Plaintiff's July 31, 2019 Verified Complaint, a true and correct copy of which is attached as Exhibit A to the Affirmation of Michael P. Pasquale (the "Pasquale Aff.").

2. Plaintiff was employed as a dentist for over a decade until Galloway was sold in 2018 to Premier Care Dental Management, LLC. *Id.*, Exhibit A, ¶¶ 1-3, 20; Exhibit C, September 1, 2008 Shareholders Agreement; Exhibit D, September 4, 2018 Asset Purchase Agreement.

3. Defendant Dr. Edwin Wiley, who founded and grew the dental practice since 1981, ran it as a sole-proprietor until such time as he intended to retire and Plaintiff agreed to purchase the practice in or about 2007.

4. As a result of decision to sell the business to Plaintiff, and based on several demands made by Plaintiff's attorney at the time, Dr. Wiley incorporated his practice and formed Galloway Dental, P.C. Pasquale Aff., Exhibit B, December 11, 2007 letter from Plaintiff regarding sale of business to him. Edwin Wiley was the sole officer and director of Galloway.

5. Both dentists also thereafter entered into the employment agreements with Galloway, as well as a Shareholder Agreement and, of the 1000 shares issued by Galloway, 850 were issued to Dr. Wiley and 150 were sold to Dr. Klein for a minimal

down payment and generous payment terms over time. Pasquale Aff., Exhibit C, September 1, 2008 Shareholders Agreement. Pursuant to Plaintiff's demands, he was given generous terms to purchase all the shares over time. *Id.*, Exhibits B and C.

6. Despite Plaintiff's demands, the incorporation of the business and time and expense devoted to the proposed sale of the practice, Plaintiff never purchased any other shares, not over the next decade or ever again.

7. Ten years later, in 2018, Dr. Wiley found a different purchaser for the practice, arranged the sale of the dental practice to it, and even found Dr. Klein employment with the purchaser for a substantially higher base salary.

8. Plaintiff Dr. Klein, a sophisticated professional himself who was represented by legal counsel at the time of the sale of the practice in 2018, not only consented to the sale, but was a party to the Asset Purchase Agreement, a signatory to it and even initialed each page of it. Exhibit D.

9. At no time before, during or after the signing of the Asset Purchase Agreement by plaintiff did he bring an appraisal action pursuant to BCL § 623.

10. After the sale, Plaintiff demanded as his share $300,000 of the $800,000 gross sales price for Galloway's assets.

11. At the beginning of 2019, Plaintiff demanded and accepted $30,000 from the Galloway sale proceeds representing payment of a portion of his 150 shares. Exhibit A, Verified Complaint, ¶ 20 and Exhibit E, Plaintiff's March 6, 2019, $30,000 demand letter.

12. On July 31, 2019, plaintiff brought the instant action. *Id*.

LEGAL ARGUMENT

POINT ONE

PLAINTIFF'S DERIVATIVE CLAIMS SHOULD BE DISMISSED BECAUSE HE CONSENTED TO THE SALE, DID NOT BRING AN APPRAISAL ACTION AND THERAFTER SOLD SHARES

Counts One through Seven of Plaintiff's Verified Complaint are all derivative in nature as they all are based on allegations of corporate mismanagement and diversion of funds. The clear law provides that if a minority shareholder of a closed corporation consents to the sale of the business, his rights are thereafter limited to bringing a statutory appraisal action. The law is also clear that if a minority shareholder such as Plaintiff dispenses with some, but not all of his shares, he becomes a creditor and no longer a shareholder able to bring a derivatiove lawsuit on behalf of the company.

Without regard to the falsity of Plaintiff's claims (which fact-based defenses are preserved for trial, if necessary) it is, in sum, **two sales**— the asset sale of the business, and the sale of some of his shares afterwards— both voluntarily entered into by Plaintiff, that are the factual bars to him now suing derivatively on behalf of Galloway. These derivative claims should all be dismissed summarily and with prejudice.

The 1st Sale: Dismissal of Plaintiff's Derivative Claims Due to the Exclusivity Bar

The Court of Appeals of New York, the Second Department and several other courts have all held that *after* the sale of a corporation's assets that is *consented to* by a minority shareholder such as Plaintiff, the shareholder's *exclusive* remedy is a statutory appraisal action, and that the person may no longer sue derivatively on behalf of the

company. *Kingston v. Breslin*, 866 N.Y.S. 2d 778, 780 (2d Dept. 2008); *Walter J. Schloss Associates v. Arkin Industries, Inc.*, 61 N.Y. 2d 700 (1984) (reversing Appellate Division, Second Department, for reasons stated in the dissenting Opinion of J. Mangano, *Walter J. Schloss Associates v. Arkin Industries, Inc.*, 455 N.Y.S. 2d 844, 847 (1982).

All the counts of the Verified Complaint share the same alleged, factual basis of mismanagement and diversion of assets by defendants to their own enrichment, and are thus derivative claims that belong to Galloway and not to the minority shareholder, Plaintiff, individually. *See* Pasquale Aff., Exhibit A, Verified Complaint, ¶ 18.

Several courts have held that a shareholder may not sue individually for the very claims brought here, and that allegations of mismanagement or diversion of assets by officers or directors pleads a wrong to the corporation alone, for which a shareholder may only sue derivatively. *Abrams v. Donati*, 66 N.Y. 2d 951, 953 (1985); *Feiliks Int'l Logistics H.K. Ltd. v. Feiliks Global Logistiscs Corp.*, 2016 U.S. Dist. LEXIS 34767 (E.D.N.Y. 2016); *Seretis v Fashion Vault Corp.*, 110 A.D.3d 547 (1st Dept. 2013).

As pronounced by the Court of Appeals, "[a] complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed." *Abrams v. Donati*, 66 N.Y. 2d 951, 953 (1985).

Plaintiff's Counts One through Seven here are derivative claims, that belong to the company Galloway, and that cannot be brought by Plaintiff in his individual capacity.

Furthermore, since he consented to the sale of Galloway's assets, the law provides that derivative claims are no longer an option, and that Plaintiff's exclusive remedy was

a statutory appraisal action, which he never brought. *Kingston v. Breslin*, 866 N.Y.S. 2d 778 (2d Dept. 2008).

Under these circumstances, the precedent is clear that this Court is all but compelled to dismiss the derivative claims summarily. *See id*.

Section 623 of the BCL, entitled *Procedure to enforce shareholder's right to receive payment for shares*, is the specific statute, as interpreted by binding precedent, that governs this case. Subsection (k) of § 623, known as the "exclusivity provision," provides that "[t]he enforcement by a shareholder of his right to receive payment for his shares in the manner provided [in Business Corporation Law § 623] shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership. . ." . *See Kingston v. Breslin*, 866 N.Y.S. 2d 778, 780 (2d Dept. 2008).

The procedure set forth in BCL § 623 is triggered when, *inter alia*, a corporation sells all, or substantially all, of its assets. *See also* BCL § 909 on the "Sale, lease, exchange or other disposition of assets"; *see also Kingston v. Breslin*, 866 N.Y.S. 2d 778, 780 (2d Dept. 2008). After a corporation sells all or substantially all of its assets, the law dictates that the exclusive remedy of a minority shareholder is to file an action for an appraisal proceeding pursuant to BCL § 623 (k). *See* BCL § 623 (a)-(k); BCL § 909 (a); *Kingston v. Breslin*, 866 N.Y.S. 2d 778 (2d Dept. 2008); *Walter J. Schloss Associates v. Arkin Industries, Inc.*, 61 N.Y. 2d 700 (1984).

In sum, New York courts have consistently held that the pursuit of an appraisal proceeding constitutes a dissenting shareholder's ***exclusive*** remedy, unless the asset sale itself is challenged in a cause of action seeking equitable relief, such as for recission of the Asset Purchase Agreement. *See Alpert v 28 Williams St. Corp.,* 63 NY2d 557, 567 (1984). Plaintiff here is not challenging the sale itself.

In *Kingston*, the Appellate Division affirmed dismissal where it was undisputed that: (i) the corporation sold it assets; (ii) the plaintiff / minority (who held 15% of the shares) consented to the sale; (iii) did not file an action asserting his appraisal rights pursuant to § 623 (k); and (iv) subsequently filed a lawsuit asserting derivative claims on behalf of the corporation. *Kingston*, 866 N.Y.S. 2d at 779-80. The present action is directly on point with *Kingston*, even down to the amount in dispute of fifteen percent.

Counts 1 through 7 (asserting claims for an Accounting, Breach of Fiduciary Duty, Aiding and Abetting Breach of Fiduciary Duty, Fraud, Unjust Enrichment and Constructive Trust, respectively) are all derivative claims, and BCL § 623 (k) – the "exclusivity provision" – serves as an independent basis mandating their dismissal by summary judgment.

The 2nd Sale: Dismissal of Derivative Claims Because Plaintiff is Not a Shareholder

BCL § 626 (b) states that in a derivative action, a plaintiff must be a shareholder "at the time of bringing the action and . . . at the time of the transaction of which he complains." This section has been interpreted as requiring a plaintiff in a shareholder derivative action to not only have been a shareholder at the time of the transaction

complained of as well as at the time of the commencement of the action, but also that the plaintiff maintain its shareholder status throughout the pendency of the action without interruption. *See Jacobs v. Cartalemi*, 67 N.Y.S. 3d 63 (2d Dept. 2017).

Where a plaintiff voluntarily disposes of the stock, his rights as a shareholder cease, and being a "stranger" to the corporation, the former stockowner lacks standing to institute or continue a derivative suit. *Id*., *Rubinstein v Catacosinos*, 459 N.Y.S.2d 286, *aff'd*, 60 NY2d 890 (1983); *Ciullo v Orange & Rockland Utils.*, 706 N.Y.S.2d 428 (1st Dept. 2000).

Plaintiff here is no longer a shareholder by virtue of the following undisputed facts: (i) the sale of Galloway; (ii) his consent to the sale; (iii) his termination of employment with Galloway; (iv) his tendering of his shares and demand for partial payment; and (v) receipt of payment for a portion of his shares.

Pursuant to the BCL, precedent and the terms of the shareholder agreement, this post-asset sale plaintiff is no longer a holder of shares, but instead a holder of debt, akin to a creditor. *Id*., *see also* Exhibit B, Shareholders Agreement, ¶ 8. BCL § 623, subsection (d), states further that: "[a] shareholder may not dissent as to less than all of the shares, as to which he has a right to dissent, held by him of record, that he owns beneficially."

It is undisputed that, prior to filing this lawsuit, plaintiff tendered his shares for payment and received $30,000 in exchange for some of his shares. Pasquale Aff., Exhibit A, Verified Complaint, ¶ 20; Exhibit E.

Additionally, BCL § 623 (e) provides that upon consummation of corporate action, such as a sale of the assets, the "shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights under this section."

The Shareholders Agreement signed by plaintiff also provides that, upon termination (including, *inter alia*, the termination of plaintiff's employment as a dentist by virtue of Galloway's asset sale to Premier, and plaintiff's subsequent employment with Premier), shareholders would be akin to creditors holding promissory notes. Exhibit C, ¶ 8. It has also long been the law, *supra*, that a shareholder who accedes to or who expressly or impliedly approves or consents to an asset sale, such as plaintiff here, no longer has standing to complain of it, and cannot attack it or maintain a derivative action on the ground of waste or mismanagement. *Beloff v. Consolidated Edison Co.*, 81 N.Y.S.2d 440 (N.Y. Sup. Ct.), *aff'd*, 85 N.Y.S.2d 303 (App. Div. 1948).

Thus, once the plaintiff consented to the asset sale of Galloway, signed each page of the Agreement thereby effecting the closing of the sale, tendered his shares and received partial payment—all undisputed— there can be no question that he lost the ability to maintain any derivative causes of action on behalf of the company, notwithstanding his possible right to a future payment for the value of his shares. *See id.*; *Jacobs v. Cartalemi*, 67 N.Y.S. 3d 63 (2d Dept. 2017). As such, BCL § 626 (b) serves as yet another, independent basis mandating dismissal of plaintiff's derivative claims in Counts One through Seven.

The Second Department's decision in *Jacobs*, *supra*, also clearly controls and provides that Plaintiff's claims, based upon alleged mismanagement and diversion of funds for personal use by the defendants, are derivative claims, not individual claims, and should be dismissed:

> In light of the plaintiff's lack of standing to maintain derivative causes of action on behalf of [the corporation], **the Supreme Court properly granted those branches of the defendants' motion** which were for summary judgment **dismissing the second, fourth, and fifth causes of action. "[A]llegations 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 v Donati, 66 NY2d 951, 953, 489 NE2d 751, 498 NYS2d 782*. The subject causes of action, which sought damages **for breach of fiduciary duty** and waste, and the imposition of **a constructive trust**, respectively, were **all based on alleged wrongs that were committed against [the corporation] and not the plaintiff individually**.
>
> **For those same reasons**, **the Supreme Court should have granted** that branch of the **defendants' motion** which was for summary judgment **dismissing the first cause of action, which sought an accounting**. "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." Here, the **plaintiff's right to an accounting** was based on his ability to prove that [defendant] breached his fiduciary duty to [the corporation], **a claim that is entirely derivative**. . .

Jacobs, 67 N.Y.S. 3d 63, 66-67 (2d Dept. 2017)(citations omitted and emphasis supplied).

In sum, Plaintiff cannot now bring these same derivative claims by virtue of BCL § 623 (k) (the "exclusivity" bar), and also BCL § 626 (b) (which limits derivative lawsuits to those who are shareholders). Accordingly, Count One (Accounting), Count Two

(Breach of Fiduciary Duty), Count Three (Aiding and Abetting Breach of Fiduciary Duty), Count Four (Fraud), Count Five (Unjust Enrichment), Count Six (Constructive Trust) and Count Seven (Common Law Embezzlement and Misappropriation of Funds), should be dismissed as derivative claims that belong exclusively to the company Galloway, and for which Plaintiff has not right to sue upon. *Id*., *see also Cortes v. 3A N. Park Ave Rest Corp*., 998 N.Y.S. 2d 797, 816-17 (2014) (dismissing claims for breach of fiduciary duty and diversion of assets as wholly derivative, stating they "plead a wrong to the corporation only", for which a shareholder may ***not*** sue individually); *see also Wolf v Rand*, 685 N.Y.S. 2d 708 (1st Dept. 1999)(stating "[e]ven where the corporation is closely held, and the defendants might share in the award, the claims belong to the corporation, and damages are awarded to the corporation rather than directly to the derivative plaintiff).

POINT TWO

PLAINTIFF'S FRAUD CLAIM IS ALSO SUBJECT TO SUMMARY DISMISSAL BECAUSE IT IS BASED UPON ALLEGED REPRESENTATIONS TO NON-PARTIES

There are additional, independent grounds to dismiss Plaintiff's fraud claim summarily. The fraud as pled in Count Four rests entirely on the vague and false allegations that Edwin and Sally Wiley filed "fraudulent tax returns and/or other tax filings." By its own words, the claim is not based on any misrepresentation made to Plaintiff, but instead upon alleged misrepresentations made to the non-plaintiff Internal

Revenue Service. The Court of Appeals has held that allegations of misrepresentations made to a third-party— not to the plaintiff— fail to state a cause of action for fraud. *Pasternack v Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817 (2016). Simply stated, fraud requires a misrepresentation made to the *plaintiff*, that *plaintiff* relied upon, to *plaintiff's* detriment and which caused him injury. Plaintiff's Verified Complaint fails to satisfy the elements of common law fraud: the alleged misrepresentation was made to another, without indication of how plaintiff relied upon it or how such reliance caused him damages. Count Four should be dismissed for this reason alone.

Furthermore, the frivolity of Plaintiff's fraud claim is revealed by even a superficial review of the agreements he signed *after* the alleged fraud is claimed to have occurred. Specifically, in the months prior to his signing the Verified Complaint, Plaintiff also signed and initialed the Asset Purchase Agreement which provided that the taxes were "paid in full, or filed for appropriate extensions, related to all taxes including but not limited to all State and Federal employee income tax, Federal Social Security tax, employment taxes. . ." Pasquale Aff., Exhibit D, ¶¶ 10(e)(1) and 10(i). Plaintiff here cannot have it both ways. He should also be charged with the fact that he is a sophisticated professional, who was represented by counsel when he signed-off on his representation in the Asset Sale Agreement that taxes were paid properly. Likewise, throughout his many years at Galloway, plaintiff always had unfettered access to tax documents of Galloway and its accountant. It was only after he was disappointed by his own unrealistic notion of his share of the Galloway sales proceeds that he invented these

false claims in a cynical effort to gain some type of strategic leverage in his improper ploy and frivolous litigation.

POINT THREE

PLAINTIFF'S COUNT FOR ATTORNEY FEES SHOULD BE DISMISSED BECAUSE NO BREACH OF CONTRACT HAS BEEN PLED AND HE CANNOT PREVAIL

Plaintiff's Count Eight, entitled "Attorney's Fees" should be dismissed as it is based solely on ¶ 37 of the Shareholders Agreement which provides that the "prevailing party" shall be entitled to reasonable attorney fees.

Plaintiff's pleading, however, fails to allege any facts in support of breach of contract and, despite containing numerous counts, fails to include one for breach of contract. Additionally, there are multiple grounds to dismiss all the other counts as being derivative claims for which Plaintiff has no legal right to make at this juncture. The law is clear that, in order to win attorney fees under a "prevailing party" clause, the "prevailing party" must prevail on at least *the central claim advanced* and receive substantial relief for that claim. *Sykes v. RFD Third Ave. I Associates, LLC*, 833 N.Y.S. 2d 76 (1st Dept. 2007).

Accordingly, Plaintiff's Count Eight should also be dismissed because Plaintiff failed even to plead breach of contract and, therefore, cannot be a prevailing party on any such, unpled claim. Furthermore, Plaintiff cannot prevail on any of the other counts in his Verified Complaint for the reasons set forth, *supra*, Points One and Two.

CONCLUSION

This Court should dismiss the case based upon the undisputed facts and law as set forth above.

LAW OFFICES OF MICHAEL P. PASQUALE, LLC
Attorneys for Defendants Edwin and Sally Wiley

By: /s/ *Michael P. Pasquale*
MICHAEL P. PASQUALE

Dated: October 20, 2021