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,

-against-

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

Defendants.

Index No.: EF006056-2019

AFFIRMATION IN OPPOSITION

STATE OF NEW YORK)

COUNTY OF ORANGE) ss:

NICOLE DINOS GERACE, an attorney duly licensed to practice law before the Courts of the State of New York, hereby affirms as follows:

1. I am the attorney of record for Plaintiff herein and as such, I am fully familiar with the facts and circumstances of this matter.

2. I make this Affirmation in opposition to Defendants' motion for summary judgment.

3. As an initial matter, Plaintiff disputes the "facts" set forth in Defendants' "Statement of Material Facts Not in Dispute" and requests that the Court disregard such statement of facts as they misstate and mischaracterize the factual allegations set forth in Plaintiff's Verified Complaint and are unsupported by affidavit.

4. The sole legal issues presented for resolution at this time are:

a. whether the exclusivity provision set forth in BCL §626(k) is a bar to Plaintiff's derivative claims;

b. whether Plaintiff meets the shareholder requirements of BCL §626(b); and

c. whether the Plaintiff's complaint adequately pleads claims for common law fraud and attorney's fees.

5. For the reasons set forth herein, it is respectfully submitted that these issues be answered in the affirmative and that the Defendants' motion for summary judgment be denied in its entirety.

BCL §623(k) is Inapplicable

6. Contrary to Defendants' contentions, BCL §623 is not automatically triggered when a corporation sells all, or substantially all, of its assets and BCL §623 is wholly inapplicable to the instant proceeding.

7. A review of §623 and the related case law makes evident that the exclusivity provision set forth in §623(k) is triggered when a dissenting shareholder ***who objects to the merger or sale of a corporation brings an appraisal proceeding***. See BCL §623(a)-(k);14A N.Y. Jur. 2d Business Relationships § 862.

8. Here, Plaintiff did not object to the sale of Galloway's assets and does not seek to bring an appraisal proceeding in connection with said sale of assets. Plaintiff is aware of the value of his shares, and the amount he is due from the sale of Galloway's assets, which Defendants continue to withhold and squander.

9. Defendants cite three cases in support of their argument that §623 is automatically triggered after a corporation sells all or substantially all of its assets and that 623 (k) stands as a bar to derivative causes of action filed later by minority shareholders. However, the cases cited

by Defendants are distinguishable in that they each involve a situation wherein a Plaintiff *shareholder is challenging an underlying sale or merger of the corporation*, thus triggering §623 and the exclusivity provision contained in §623(k).

10. In *Kingston v. Breslin*, 56 A.D.3d 430 (2nd Dept. 2008), a shareholder brought a derivative action ***challenging the sale of a scaffolding corporation***, rather than in his individual capacity as shareholder, and thus the Court held that the exclusivity provision did not permit him to bring action for equitable relief on ground that he was fraudulently induced to sign consent to agreement for sale.

11. Likewise, the Court of Appeals in *Walter J. Schloss Assocs. v. Arkwin Indust., Inc.*, 61 N.Y.2d 700, 703 (1984), rev'd 455 N.Y.S.2d 844 (2nd Dept. 1982) held that appraisal procedures under the Business Corporation Law were exclusive remedies for injuries allegedly sustained by minority shareholder as result of majority shareholder's alleged self-dealing ***with respect to merger of corporations and offer of inadequate price for stock of minority shareholders***, and failure of minority shareholder to avail itself of those procedures barred action for accounting and damages.

12. Lastly, the Court of Appeals in *Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 567-68 (1984) held that "the remedy of a shareholder ***dissenting from a merger and the offered "cash-out" price*** is to obtain the fair value of his or her stock through an appraisal proceeding (citing Business Corporation Law, § 623)". The Court elaborated on the rationale behind §623 explaining that it protects the minority shareholder from being forced to sell at unfair values imposed by those dominating the corporation while allowing the majority to proceed with its desired merger. (citing *Matter of Endicott Johnson Corp. v. Bade*, 37 N.Y.2d 585, 590, 376 N.Y.S.2d 103, 338 N.E.2d 614; *Klurfeld v. Equity Enterprises*, 79 A.D.2d 124, 134, 436

N.Y.S.2d 303; see *Anderson v. International Mins. & Chem. Corp.*, 295 N.Y. 343, 347–350, 67 N.E.2d 573)."

13. The cases cited by Defendants: *Kingston*, *Walter J. Schloss Assocs*, and *Alpert* involved cases in which a Plaintiff shareholder sought to challenge the sale or merger of the corporation and where the crux of the Plaintiff's complaint challenged the underlying corporate sale or merger that gave rise to the derivative claims at issue, thereby triggering BCL §623 .

14. Here, Plaintiff's claims are not borne from the sale of Galloway's assets, but rather from the corporate waste that occurred prior to and since the sale of Galloway's assets. As such, §623 is not triggered and is inapplicable herein.

15. Furthermore, the case law makes clear that the purpose of §623 is to avoid duplicative legal proceedings, not to limit a Plaintiff shareholder's remedies. §623 dictates that a shareholder may not also commence an individual or derivative action for money damages because allowing a legal action for damages after the exercise of the right of appraisal would be unnecessarily duplicative, in that full and proper monetary recovery of the fair value of dissenters' shares may be obtained in an appraisal proceeding. See *Walter J. Schloss Assocs. v. Arkwin Indust., Inc.*, 61 N.Y.2d 700, 703, 472 N.Y.S.2d 605, 606 (1984), rev'g 455 N.Y.S.2d 844 (2nd Dept. 1982) (adopting dissenting opinion of Mangano, J., of the Appellate Division as Court of Appeals decision, which opinion stated that an action for money damages is not permitted because it "would allow a dissenting shareholder, by merely alleging fraudulent or unlawful corporate conduct, to seek therein the identical relief available to him in appraisal proceedings." Schloss, 455 N.Y.S.2d at 851-52); *Theodore Trust v. Smadbeck*, 277 A.D.2d 67, 68, 717 N.Y.S.2d 7, 8 (1st Dept. 2000). See also *Collins v. Telcoa Intern. Corp.* 283 A.D.2d 128, 726 N.Y.S.2d 679 (2nd Dept. 2001) ("[o]nce dissenting shareholder who objects to merger or sale of

corporation brings appraisal proceeding, shareholder may not also commence an individual or derivative action for money damages; 'allowing legal action for damages after the exercise of right of appraisal would be unnecessarily duplicative in that full and proper monetary recovery of fair value of dissenters' shares may be obtained in appraisal proceeding' " *Collins* at 132 citing *Breed v. Barton*, 54 N.Y.2d 82, 429 N.E.2d 128, 444 N.Y.S.2d 609 (1981).

16. Here, there is no risk of duplicative proceedings or recovery as Plaintiff does not seek to maintain an appraisal proceeding.

17. Plaintiff does not dispute that an appraisal proceeding is the exclusive remedy for shareholders dissenting to the terms upon which a corporation has offered its shares for sale in the context of a corporate merger or sale. However, none of the authority cited by Defendants stands for proposition that an appraisal proceeding is the exclusive remedy for a shareholder seeking to recover for the Defendants' acts described in Plaintiff's Verified Complaint including:

a. Regularly paying personal expenses with Galloway funds;
b. Paying excess compensation to family members;
c. Paying compensation in the form of wages to family members that were not actually working for Galloway;
d. Paying excess rental payments to Warwick Gardens, LLC, a company wholly owned by Defendants;
e. Incurring excessive personal debt in the name of the corporation;
f. Mismanaging corporate affairs thereby plunging Galloway into substantial debt;
g. Filing fraudulent tax returns; and
h. Authorizing employees to pay personal expenses with Corporate funds.

Verified Complaint ¶18.

18. In *Collins v Telcoa Intern. Corp.*, 283 AD2d 128, 133 (2nd Dept. 2001) a minority shareholder brought an action against majority shareholders seeking damages based on majority shareholder's alleged breach of fiduciary duty by their numerous acts of minority oppression, self-dealing, and fraud. Defendants therein argued that the plaintiff's sole remedy is valuation of his shares pursuant to BCL §623. *Id*. at 132. The Second Department held that "[h]ad the plaintiff commenced the instant action as a valuation proceeding pursuant to Business Corporation Law § 623, his causes of action for money damages would have been dismissed. Since he did not, however, nothing prevents him from maintaining a cause of action for money damages against [majority shareholders] based on their alleged breaches of fiduciary duty (citing *Giblin v. Murphy*, 73 NY2d 769, 532 N.E.2d 1282, 536 N.Y.S.2d 54 (1988); *H.W. Collections v. Kolber*, 256 A.D.2d 240, 682 N.Y.S.2d 189 (1st Dept. 1998); *Fedele v. Seybert*, 250 A.D.2d 519, 673 N.Y.S.2d 421 (1st Dept. 1998); *Independent Investor Protective League v. Time, Inc.*, 66 A.D.2d 391, 393, 412 N.Y.S.2d 898 (1st Dept. 1979), mod. on other grounds 50 N.Y.2d 259, 428 N.Y.S.2d 671, 406 N.E.2d 486)."

19. Plaintiff has not commenced an appraisal proceeding pursuant to BCL §623 in seeking to, inter alia, recover the hundreds of thousands of dollars Defendants have diverted from Galloway for their own personal use prior to and since the sale of Galloway's assets. As such, BCL §623 is inapplicable and Plaintiff is entitled to proceed with his individual and derivative causes of action against Defendants.

Galloway is an Active Corporation and Plaintiff Was and Remains a 15% Shareholder

20. As set forth in the Complaint and the accompanying Affidavit of Gregory Klein ("Klein Aff."), on September 4, 2018, Klein and Wiley entered into an Asset Purchase Agreement for the sale of Galloway's assets. Verified Complaint ¶20 and Klein Aff. ¶2.

21. Contrary to Defendants' counsel's unsupported assertions, Plaintiff never executed a stock purchase agreement, and never transferred, tendered, or otherwise disposed of his 15% interest in Galloway and Klein remains a shareholder of Galloway. Klein Aff ¶ 1, 3; Verified Complaint ¶1.

22. Galloway is an active corporation in the process of winding up its affairs. See Klein Aff., **Exhibit 1**.

23. In fact, since the sale of Galloway's assets in September 2018, Galloway has conducted regular monthly transactions and continues to deposit and disburse funds from the corporate bank account[1]. Klein Aff., **Exhibit 2**. Curiously, said transactions include regular disbursements to Defendants, their counsel, and various personal credit card payments. Klein Aff., **Exhibit 2**. In short, Defendants continue to squander Galloway's assets while Klein has not been fully compensated for his shares. See Klein Aff. ¶6.

24. Defendants' reliance on ¶ 8 of the Shareholder's Agreement is misleading and disingenuous. A review of ¶8 of the Shareholder's Agreement addresses the purchase terms for the sale or buy-back of stock, not a sale of Galloway's assets. Notably, Defendants do not quote language from the alleged relevant portions of the Shareholder's Agreement because it is wholly irrelevant to the circumstances at hand.

25. Once again, the cases cited by Defendants (*Beloff v. Consolidated Edison Co.*, 81 N.Y.S.2d 440 (N.Y. Sup. Ct.), aff'd, 85N.Y.S.2d 303 (App. Div. 1948). and *Jacobs v. Cartalemi,* 67 N.Y.S. 3d 63 (2nd Dept. 2017) are inapplicable and involve situations in which a Plaintiff

[1] On September 4, 2018, the sum of $800,000 was deposited into the Galloway corporate bank account in connection with the Asset Purchase Agreement. See **Exhibit 2**. As of November 1, 2020, only $260,859.78 remains in Galloway's account. **Exhibit 2**.

attempted to bring a derivative action after Plaintiff ***sold or tendered their shares*** of a corporation. Again, Plaintiff has not sold or tendered his shares in Galloway.

Plaintiff Has Standing to Maintain a Derivative Action

26. For the reasons set forth above, §623 is inapplicable and Plaintiff remains a 15% shareholder of Galloway (as alleged herein and in Plaintiff's Verified Complaint) and as such, Plaintiff has standing to bring derivative causes of action against the Defendant herein[2].

This Court Has Already Determined That Plaintiff Sufficiently Plead Fraud

27. Defendants bring yet another attempt to dismiss Plaintiff's fraud claim despite the fact that this Court has already considered and rejected such argument.

28. Defendants aver that "Plaintiff's Verified Complaint fails to satisfy the elements of fraud." Aff. of Michael P. Pasquale, Esq. ¶43. However, in her Decision and Order issued on November 20, 2019 the Hon. Elaine Slobod determined that "plaintiff's allegations sufficiently comply with CPLR 3016, particularly in light of the limited information available to him" citing *DaPuzzo v. Reznik Fedder & Silverman,* 14 A.D.3d 302, 302-03 (1st Dept. 2005). (NYCEF Doc. No. 18).

29. Clearly, the issue of whether Plaintiff's fraud claim is sufficiently pled has been litigated and adjudicated by this Court as such, Defendants are estopped from making the same argument herein.

Dismissal of Plaintiff's Cause of Action for Attorney's Fee is Unwarranted

[2] Plaintiff's claims against Salley Wiley are individual in nature, and as such, Plaintiff's causes of action against Defendant Salley Wiley should not be dismissed.

30. The Shareholder's Agreement provides that "[i]n the event that any dispute arises between the parties….the prevailing party shall be entitled to receive reasonable attorney's fees…" Shareholder's Agreement ¶37.

31. Defendants' contention that Plaintiff "should not prevail on any of the courts in his Verified Complaint" is not a sufficient basis to dismiss Plaintiff's cause of action for attorney's fees.

WHEREFORE, for the reasons set forth herein, it is respectfully requested that this Court deny Defendant's motion for summary judgment in its entirety.

Dated: November 5, 2021

Nicole Dinos Gerace