

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ORANGE

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

Plaintiff,

-against-

DECISION & ORDER

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

Index No.: EF006056-2019

Defendants.  
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Defendants move for an order granting them summary judgment, pursuant to  
CPLR 3212, dismissing plaintiff's complaint against them.

The following papers were read:

Notice of Motion - Brief in Support of Defendant's Motion for Summary Judgment - Michael P. Pasquale, Esq's Affirmation in Support - Annexed Exhibits	1 - 4
Defendants' Statement of Undisputed Material Facts	5
Nicole Dinos Gerace, Esq.'s Affirmation in Opposition - Gregory Klein, D.M.D.'s November 13, 2020 Affidavit in Opposition - Annexed Exhibits	6 - 8
Reply Affirmation of Michael P. Pasquale, Esq.	9

Upon the foregoing papers it is hereby ORDERED that the defendants' motion for  
summary judgment is granted.

This action arises out of the sale of the dental practice known as Galloway

Dental, P.C. to Premier Care Dental Management, LLC for the sum of \$800,000.

Plaintiff Gregory Klein, D.M.D. owned 150 shares of stock (a 15% interest) of Galloway Dental, P.C. and defendant Edwin Wiley, D.M.D. owned 850 shares of stock (an 85% interest). It is undisputed that the plaintiff consented to the sale of the dental practice and signed the Asset Purchase Agreement. After the sale of the business was completed in September, 2018, plaintiff sought \$300,000 as his portion of the \$800,00 gross sale price. In March, 2019, plaintiff demanded \$30,000 as partial payment for plaintiff's shares of stock and defendants did pay the plaintiff \$30,000. Thereafter, the parties did not come to an agreement as to the value of plaintiff's shares and plaintiff commenced the instant action on July 31, 2019.

The plaintiff's verified complaint includes a first cause of action for an accounting, a second cause for breach of fiduciary duty, a third cause of action for aiding and abetting breach of fiduciary duty, a fourth cause of action for fraud, a fifth cause of action for unjust enrichment, a sixth cause of action for constructive trust, a seventh cause of action for common law embezzlement and misappropriation of funds, and an eighth cause of action for attorney's fees. In the verified complaint, under the heading "Factual Allegations Common to All Causes of Action", plaintiff states, "It is imperative that WILEY AND SALLY [the defendants] account for the funds improperly expended for personal use, return funds improperly diverted to WILEY and his family for personal use to GALLOWAY, and pay KLEIN the value of his 15% shareholder interest" (*Verified Complaint*, paragraph 21). The ad damnum clause of the verified complaint reads as follows:

"WHEREFORE, plaintiff respectfully requests a judgment against defendants as follows:

- (a) An accounting for any and all monies obtained by defendants which were rightfully the property of GALLOWAY;
- (b) Judgment in an amount to be determined at trial, including compensatory and punitive damages;
- (c) Pre- and post-judgment interest, to the fullest extent permitted by law;
- (d) Reasonable attorney's fees, costs, and expenses;
- (e) Such other relief as the Court may deem just and proper."

Although plaintiff may characterize his action as one seeking equitable relief, it is apparent that plaintiff is seeking money damages for the value of his 15% shareholder interest.

Business Corporation Law §623 is entitled, "Procedure to enforce shareholder's right to receive payment for shares." The sale of the assets of Galloway Dental, P.C. "gave rise to the plaintiff's individual right to an appraisal and to receive payment for his shares pursuant to Business Corporation Law §623 (hereinafter the appraisal rights). Pursuant to Business Corporation Law §623[k], '[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' (hereinafter the exclusivity provision). Here, having failed to avail himself of his appraisal rights, the plaintiff" instead commenced an action setting forth various derivative causes of action

(*Kingston v. Breslin*, 56 AD3d 430, 431-432 [2<sup>nd</sup> Dept., 2008]). "While the exclusivity provision of Business Corporation Law §623[k] permits an individual shareholder who foregoes the statutory appraisal proceeding pursuant to Business Corporation Law §623 to bring an action for equitable relief on the ground that the corporation action was fraudulent as to that shareholder, the exclusivity provision is not applicable to derivative causes of action, such as those at bar, which were asserted on behalf of [Galloway Dental, P.C.] and not on behalf of the plaintiff in his individual capacity" (*Kingston v. Breslin*, 56 AD3d 430, 432 [2<sup>nd</sup> Dept., 2008] citing *Breed v. Barton*, 54 NY2d 82, 85-86, 444.NYS2d 609, 429 NE2d 128; *Norte & Co. v. New York & Harlem R.R. Co.*, 222 AD2d 357, 358, 635 NYS2d 629). Accordingly, the plaintiff's first seven causes of action, which are derivative in nature, must be dismissed.

The Court notes that the plaintiff argues that the exclusivity rule of Business Corporation Law §623[k] does not apply as the plaintiff chose not to exercise his right of appraisal. However, as stated by Justice Mangano in his dissent, which was adopted by Court of Appeals as its unanimous decision in *Walter J. Schloss Assoc. v. Arkwin Indus.*, 61 NY2d 700 [1984], "It should be emphasized that the exclusivity rule as interpreted by the Court of Appeals...did not limit its applicability to cases...where the right of appraisal had been exercised. It extended it to cases, such as the one at bar, where the right was apparently not exercised but clearly available" (*Walter J. Schloss Assoc. v. Arkwin Indus.*, 90 NY2d 149, 162 [2<sup>nd</sup> Dept., 1982]). In the matter *sub judice*, "the full and proper monetary recovery of the fair value of [plaintiff's] shares may be obtained in appraisal proceedings in which the discharge of the majority's fiduciary duty

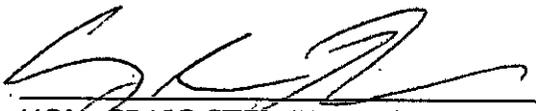
to the minority can be weighed in determining fair value" (*Walter J. Schloss Assoc. v. Arkwin Industries, Inc.* 90 AD2d 149, 161, adopted by the Court of Appeals in *Walter J. Schloss Assoc. v. Arkwin Indus.*, 61 NY2d 700 [1984]).

Finally, the eighth cause of action, which is for attorney's fees, must be dismissed. Said cause of action relates to a contract between the parties and there is no allegation within the verified complaint of any breach of this contract. Accordingly, for all of the foregoing reasons, the defendant's motion for summary judgment dismissing the plaintiff's complaint against them must be granted (*see Kingston v. Breslin*, 56 AD3d 430 [2<sup>nd</sup> Dept., 2008]; *Sparks v. Equities*, 186 AD3d 1177 [1<sup>st</sup> Dept., 2020]; *Alpert v. Williams St. Corp.*, 63 NY2d 557 [1984]; *Walter J. Schloss Assoc. v. Arkwin Indus.*, 61 NY2d 700 [1984]; *Jacobs v. Cartalemi*, 156 AD3d 605 [2<sup>nd</sup> Dept., 2017]).

This matter is scheduled for a conference on December 20, 2021 at 12:00 p.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: ~~November~~ <sup>DECEMBER</sup> 9, 2021  
Goshen, New York

  
HON. CRAIG STÉPHEN BROWN  
Acting Supreme Court Justice

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