

**Plaintiff-Appellant requests
15 minutes for Oral Argument**

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - SECOND DEPARTMENT**

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

**Appellate Division File Nos.
2023-01437**

Plaintiffs-Appellants,

vs.

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

**Orange County Supreme Court
Index No. EF006056-2019**

Defendants-Respondents,

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT PURSUANT TO CPLR RULE 5531

1. The index number of the case in the court below is EF006056/2019.
2. The full names of the original parties are Gregory Klien and, derivatively, Galloway Dental, P.C., Plaintiffs and Edwin Wiley, D.M.D., individually and as a shareholder of Galloway Dental, P.C., and Sally Wiley, Defendants. There have been no changes.
3. The original action commenced in the Supreme Court, State of New York, County of Orange.
4. This action was commenced by the filing of a Summons and Complaint in the Orange County Clerk's office on July 31, 2019. The Defendant, Sally Wiley filed an Answer on September 23, 2019. The Defendant, Edwin Wiley filed an Answer on December 9, 2019. The Defendants, Edwin Wiley and Sally Wiley filed an Amended Answer and Counterclaims on May 22, 2021. The Plaintiff filed an Answer to Counterclaims on July 5, 2021.
5. This action was brought to seeking redress against the Defendants for corporate looting and failure to distribute the proceeds from the sale of corporate assets alleging causes of action for an Accounting and Breach of Fiduciary Duty, Aiding and Abetting Breach of Fiduciary Duty, Fraud, Unjust Enrichment, imposition of a Constructive Trust, Common Law Embezzlement and Misappropriation of Funds and Attorney's Fee.
6. This appeal is from a decision and order of Hon. Craig Stephen Brown, J.S.C., dated December 9, 2021, and entered in the Orange County Clerk's Office on December 9, 2021, which granted summary judgement to the Defendants dismissing the Complaint.
7. The appeal is upon the full record on appeal.
8. The order appealed from was rendered without a trial or hearing.

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STATEMENT OF QUESTIONS PRESENTED

1. Where a minority shareholder consents to a sale of corporate assets which would otherwise give rise to the right of a minority shareholder to require a buy-out of his shares, does [BCL §623\(k\)](#) preclude him seeking relief from majority member misdeeds unrelated to the sale?

Answer of the Court appealed from: Yes.

2. Where there is a sale of corporate assets which gives rise to the right of a minority shareholder to require a buy-out of his shares by the corporation under [BCL §910](#), but instead the shareholder consents to the sale and remains a shareholder, does [BCL §623\(k\)](#) preclude the shareholder from seeking derivative relief against a majority shareholder for prior corporate looting which occurred subsequent to the sale and was unrelated to the sale?

Answer of the Court appealed from: Yes.

3. Where there is a sale of corporate assets which gives rise to the right of a minority shareholder to require a buy-out of his shares by the corporation under [BCL §910](#), but instead the shareholder consents to the sale and remains a shareholder, and brings an action containing causes of action for equitable relief, which unartfully combine a personal claim and a derivative claim in each such cause of action, and the only claims permitted [under BCL §623\(k\)](#) are personal claims should the complaint be dismissed?

Answer of the Court appealed from: Yes.

4. Where there is a sale of corporate assets which gives rise to the right of a minority shareholder to require a buy-out of his shares by the corporation under [BCL §910](#), but instead the shareholder consents to the sale and remains a shareholder, and brings an action containing causes of action for equitable

relief, which unartfully combine a personal claim and a derivative claim in each such cause of action, and the only claims permitted under BCL §623(k) are personal claims, should the Court dismiss only the derivative claims and allow the action to proceed as to the personal claims?

Answer of the Court appealed from: No.

5. Where there is a sale of corporate assets which gives rise to the right of a minority shareholder to require a buy-out of his shares by the corporation under BCL §910, but instead the shareholder consents to the sale and remains a shareholder, does the exclusivity provisions of BCL §623(k) preclude the minority shareholder from bringing a derivative claim against the thieving employee?

Answer of the Court appealed from: Yes.

6. Whether the failure to include all pleadings required the trial court to deny Defendant's motion for summary judgment.

Answer of the Court appealed from: The lower court implicitly answered No by deciding the motion without the benefit of all pleadings such as Defendant's Amended Verified Answer.

INTRODUCTORY STATEMENT

The Plaintiff-Appellant was and remains a minority (15%) shareholder of Galloway Dental, P.C. (the “Corporation”), which sold substantially all of its assets under an asset sale-purchase agreement for a price of \$800,000.00, to which the Plaintiff consented. Nevertheless, Plaintiff was aware of the fact that the majority shareholder and his wife, who was an employee of the Corporation but not a shareholder, officer or director, had been looting corporate funds to their own benefit. After the sale, and not having resolved those issues, and while the Corporation remained in existence and Plaintiff remained a shareholder thereof, the Plaintiff brought an action individually and derivatively (the causes of action alleged with respect to the various relief sought were stated jointly as personal and derivative.), against the majority and only other (85%) shareholder, Edwin Wiley (“Edwin”) and against his wife Sally Wiley (“Sally”), seeking relief based upon claims, essentially, that Edwin and Sally looted corporate assets prior to and after the sale (which allegations were also made against Edwin’s wife, Sally Wiley (“Sally”) and for distribution to the Plaintiff of the sums due the Plaintiff from the sale of the Corporation’s assets. The complaint alleges, inter alia, the equitable causes of action for an accounting, breach of fiduciary duty, unjust enrichment,

embezzlement, misappropriation of funds and for imposition of a constructive trust. Defendants moved to dismiss the Complaint, by Decision By Order dated December 09, 2019, Justice Slobod denied the motion. (NYCEFS Doc. 18)

The Defendants moved for summary judgment seeking dismissal of the complaint based upon the argument that under [BCL §623](#) the Plaintiff's only remedy, where a corporate action gives rise to the right to dissent, is to dissent from the action and be paid the appraised value of his stock and because the Plaintiff failed to dissent, but instead consented to the sale, he was precluded from seeking any relief under the exclusivity provision of [BCL §623\(k\)](#). The Defendants also argued that the Plaintiff's claims did not fit within the exception in [BCL §623\(k\)](#) which permit equitable claim for fraud and illegal conduct as to the minority shareholder personally.

The Supreme Court by its Decision and Order (the "Decision and Order") appealed from herein, dismissed all causes of action in the complaint, not on the merits of the claims, but because under [BCL §623\(k\)](#) his only claim against the majority shareholder was to demand a corporate buy-out of his shares at their appraised value, which claim was waived by his consent to the sale. Supreme Court also dismissed the equitable causes of action allege in the Complaint because

they had been alleged derivatively and the exception under [BCL §623\(k\)](#) applied only to personal claims.

Those determinations were in error for several reasons, each requiring reversal.

First, under [BCL §623](#) where a minority shareholder consents to a corporate action, he is precluded from seeking the Buy-Out Option, but not precluded from seeking personal equitable relief or other relief unrelated to the corporate action, after the consummation of the corporate action. [See](#), (BCL §623(e) stating “he [the minority shareholder] shall be reinstated to all his rights as a shareholder as of the consummation of the corporate action”) and here the corporate assets had been sold prior to the action being brought.

Second, even if the preclusive effect of [BCL §623\(k\)](#) were found to be permanent, it can only be held to proscribe claims relating to misconduct prior to the corporate action, again as made clear by [BCL §623\(e\)](#) above, after the sale the minority shareholders rights are restored. Otherwise, a minority shareholder would be forever denied relief, simply because he consented to one corporate action. The claims in the Complaint alleged wrongdoing by the majority shareholder and his

wife both before and after the sale of the corporate assets and at the least should not have been dismissed with respect to the subsequent wrongs.

Third, the equitable claims alleged in the Complaint fit squarely within the equitable claim exception stated in [BCL §623\(k\)](#). Although the Complaint mixed the personal claims with the derivative claims, only the derivative aspect of the claims should have been dismissed and if necessary, the Plaintiff should have been permitted to replead.

STATEMENT OF APPLICABLE FACTS

The Plaintiff is a minority (15%) shareholder of Galloway Dental, P.C. (Galloway”) (R., 38) Edwin is the majority (85%) owner of [Galloway](#) (R. 38). Galloway entered into a contract to sell all or substantially all of its assets (R., 63-80). The Plaintiff consented to the sale (R., 63-80). The contract price was \$800,000.00 (R., 63-80), of which the Plaintiff has been paid only \$30,000.00 (R., 20). The closing of the sale took place on September 4, 2018 (R., 20). Edwin and Sally have and continue to loot the Galloway 5.

This action was commenced on July 31, 2019 (R., 38). The Complaint in this action alleges 8 causes of action each plead individually and derivatively, for

an Accounting, Breach of Fiduciary Duty, Aiding and Abetting Breach of Fiduciary Duty, Unjust Enrichment, Imposition of a Constructive Trust, Common Law Embezzlement and Misappropriation of Funds, and for Attorney's Fees. (R., 38-50)

The Defendants submitted separate Answers (R., 49-53) and thereafter a joint Amended Answer with Counterclaims (NYCEFS Doc 57¹) was filed on May 22, 2021. The Defendants moved for Summary Judgment to Dismiss the Complaint in its entirety on October 20, 2021(R. 14-15). By Decision and Order dated and filed on December 9, 2021 (R., 10-15) Supreme Court granted the motion, dismissing the Complaint.

¹ Defendant-Respondent did not include this document as part of his motion for summary judgment even though Defendant filed the same on May 22, 2021. See Point IV, *infra*.

ARGUMENT

POINT I

WHEN A CORPORATE ASSETS IS SOLD, BCL § 623 GIVES A MINORITY SHAREHOLDER TWO OPTIONS, TO EITHER CONSENT TO THE SALE OR DISSENT AND IN EITHER EVENT PROVIDES THE SHAREHOLDER WITH REMEDIES AGAINST MAJORITY SHAREHOLDER MISCONDUCT

The purpose of [BCL §623](#), entitled “Procedure to enforce shareholder’s right to receive payment for shares” is to proscribe the procedural course a minority shareholder is to follow when a corporation is about to take an action which would permit the minority shareholder to elect that the corporation purchase his shares of stock at their appraised value (the “Buy-Out Option”). Under [BCL §910](#), entitled “Right of shareholder to receive payment for shares upon merger or consolidation, or sale, lease, exchange or other disposition of assets, or share exchange”. One of those corporate actions is the sale of all or substantially all its assets.

In such an event, the shareholder is given two options, to either dissent from the sale or consent to the sale.

Rights of minority shareholder after dissenting to corporate action.

The first option, the Buy-Out Option, to dissent from the corporate action, if exercised commences a process by which the value of the minority shareholder's stock is determined, the minority shareholder is paid the value of his stock, and the stock is transferred to the corporation.

Thus, [BCL § 623\(a\)](#) provides:

“A shareholder intending to enforce his right under a section of this chapter to receive payment for his shares if the proposed corporate action referred to therein is taken shall file with the corporation before the meeting of shareholders at which the action is submitted to a vote . . . ***written objection to the action.***” (*Emphasis added.*)

After such an election, [BCL § 623](#) at subsections c, d, part of e and f through h, set forth a complicated process whereby the value of the shares of the dissenting minority shareholder is established, the value paid to the minority shareholder and his shares transferred to the corporation.

[BCL § 623\(k\)](#) then provides that where a shareholder makes that election, he waives substantially all other claims against the corporation or the majority

shareholder other than equitable actions for unlawful or fraudulent conduct as to him, specifically providing:

“(k) The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership except as provided in paragraph (e) and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.”

Had the Plaintiff elected to dissent, he would have been relegated to follow those procedures to be paid.

Rights of minority shareholder after consenting to corporate action.

However, [BCL§623](#) also provides the process by which a minority shareholder can obtain relief against a majority shareholder and others who have committed wrongs against him and the corporation unrelated to the sale of the corporate assets. That process is provided under [BCL § 623\(b\) & \(e\)](#).

First, [BCL §623\(b\)](#), which initially requires corporate notice to minority shareholders of the corporate action, also provides that no notice need be given to

minority shareholders who had consented to the sale and that such consenting minority shareholder “is deemed to have elected not to enforce his right to receive payment for his shares.” Specifically, BCL §623(b) provides:

“Within ten days after the shareholders’ authorization date . . . the corporation shall give written notice of such authorization . . . excepting any shareholder who voted for or consented in writing to the proposed action and who thereby is deemed to have elected not to enforce his right to receive payment for his shares.”

This wording is important because once a minority shareholder is deemed to have elected “not to enforce his right to receive payment of his shares [his dissenter’s rights]”, [the applicability](#) of BCL §623(e) becomes clear and the inapplicability of the exclusive [remedy provisions](#) of BCL §623(k) become equally clear.

Once a minority shareholder has been deemed to have waived his Buy-Out Option, then [BCL §623\(e\)](#) establishes his future rights and remedies, by restoring to him, all prior rights of a shareholder (except the Buy-Out Option), providing that where:

“If a notice of election is withdrawn, or the corporate action is rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his

shares, or the shareholder shall otherwise lose his dissenters' rights, he shall not have a right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the consummation of the corporate action.”(Emphasis added.)

Accordingly, once the Plaintiff consented to the sale, he was deemed to have waived his dissenter's rights but his other rights as a shareholder were reinstated after the consummation of the corporate action. As applied to this case, Plaintiff consented to the sale. Thereupon he was deemed no longer eligible to seek to be paid for the sale of his shares to the corporation. Then, upon the consummation of the sale and still having ownership of the stock, his other rights as a shareholder were returned to him, including the right to bring all the causes of action contained in the complaint, both individually and derivatively.

Further, the inapplicability of the exclusive remedy provision under [BCL §623\(k\)](#), is made obvious by its provisions.

First its opening words restrict the application of its exclusive remedy provisions to those instances involving, “The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein . . .”. Here, by virtue of the provisions [of BCL §623\(b\)](#) and (e) the Plaintiff does not seek to

enforce that option and accordingly, the exclusive remedy provisions do not apply to him.

Moreover, then [BCL §623\(k\)](#) makes that doubly clear by providing:

“The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, ***except as provided in paragraph (e) . . .***” (*Emphasis added.*)

As stated earlier, BCL §623(e) provides that a shareholder consenting to the sale of corporate assets shall be, “reinstated to all his rights as a shareholder as of the consummation of the corporate action.” Further, the statute does not provide that those rights can only be exercise with respect to post consummation wrongs against him or the corporation and there is no reason for the Court to judicially legislate such a curtailment of a minority shareholder’s rights.

Here, the Complaint does nothing more than seek to enforce the Plaintiff’s rights reinstated to him upon the consummation of the corporate action, that being the sale of the Corporation’s assets on September 4, 2018.

When the Defendants argued that the Plaintiff was precluded from prosecuting the claims alleged in the Complaint against the majority shareholder and his wife for looting and embezzling from the Corporation outside of the sale of the corporate assets by reason of the exclusive remedy provision of [BCL §623\(e\)](#), they ignored the alternative relief granted a minority shareholder under [BCL §623\(b\)](#) and (e). Further, in dismissing the Complaint on that ground, the Supreme Court misapprehended that the exclusive remedy provisions did not apply to a shareholder who did not elect to dissent to the sale of the corporate assets and that the Plaintiff's claims in the Complaint were specifically excluded from the prohibition by the provision in [BCL §623\(k\)](#), excluding claims made pursuant to [BCL §623\(e\)](#). As a result, the dismissal of the Complaint should be reversed.

POINT II

ASSUMING, *ARGUENDO*, IT IS HELD THAT THE PLAINTIFF WAIVED HIS DERIVATIVE CLAIMS FOR PAST WRONGS TO THE CORPORATION, NOTHING IN THE STATUTE PRECLUDES CLAIMS FOR WRONGS AFTER THE CORPORATE ACTION IS COMPLETED

Nothing in the statute or in any case relied upon by the Supreme Court states that a minority shareholder retaining his share ownership cannot seek relief against others for wrongs committed after the corporate action has been consummated. It [fact BCL §623\(e\)](#) states quite clearly just the opposite, stating, “he shall be reinstated to all his rights as a shareholder as of the consummation of the corporate action.” Here in the year 2023, some five years after the sale of the Corporation’s assets, the only distribution to the Plaintiff has been \$30,00.00 out of at least \$800,000.00 in the Corporation’s bank account. Obviously, the Complaint seeks relief for misdeeds continuing after the consummation of the corporate action (the sale of the assets), and those elements of the claim in the Complaint should not have been dismissed.

POINT III

ASSUMING, *ARGUENDO*, THE PLAINTIFF'S CLAIMS ARE NOT PRESERVED UNDER BCL 623(b) and (e), THEN THEY ARE PRESERVED BY THE PERSONAL CLAIMS EXCEPTION IN BCL § 623(k)

To reach this point it will have been necessary for the Court to have determined that the interpretation of BCL §623 argued in Point I and alternatively in Point II, are not correct and instead the only exception to the exclusionary provision in BCL §623(k) are for claims seeking relief from fraudulent or illegal conduct against a minority shareholder, personally. That exception has been defined to include only claims which could: i) be brought in the name of the minority shareholder and ii) which sought money damages ancillary to some specific form of equitable relief. See, Breed v. Barton, 54 NY2d 82 (1981), and *Walter J. Schloss Assocs. v. Arkwin Indus.*, 90A.D.2d 129 (2 Dept., 1982), reversed on the dissenting opinion of J. Mangano, in *Walter J. Schloss Assocs. v. Arkwin Indus.*, 61N.Y.2d 700 (1984) which extends the exception to consenting minority shareholders, both relied upon in the Decision and Order.

The Decision and Order did not review the first seven (7) causes of action alleged in the Complaint individually to determine if any met the exception, but

dismissed all seven causes of action because the trial court determined they had not been alleged individually but derivatively and therefore did not meet the first element of the exception (a claim of individual injury). It is respectfully submitted that the appropriate action for that drafting error was to ignore it or require the claims to be replied but not dismissed. See e.g., Decision and Order of Justice Slobod (NYCEF Doc.18)

However, the issue is not whether the Plaintiff-Appellant had artfully pled a cause of action independent of a derivative cause of action but whether Plaintiff-Appellant has a cause of action. [*Holdampf v. A.C. & S., Inc. \(In re N.Y. City Asbestos Litg.\)*, 14 A.D.3d 112, 123 \(1Dept, 2004\)](#), in a decision reversing the grant of summary judgment, holding:

“The standard for measuring the sufficiency of the pleadings is not whether the proponent of the pleading stated a cause of action, but rather whether the plaintiff *has* a cause of action.” (Emphasis as in original.)

Here, even if Plaintiff-Appellant might have inartfully pleaded his individual claims of accounting, unjust enrichment or to impose a trust, does not change that law provides that he does have those causes of action and he has alleged facts, which remain undisputed and certainly un-refuted, which support those claims.

Under those circumstances, summary judgment should not have been granted against him.

Indeed, the lower court never determined whether whether the specific causes of action may be alleged individually and if so, whether the relief sought is primarily equitable and money damages are ancillary. A remand for that determination is appropriate.

However, no such remand is necessary with respect to the causes of action alleged in the Complaint for an accounting and for the imposition of a constructive trust or the underlying claims of breach of fiduciary duty. These claims are equitable in nature and seek relief that is beyond just money damages. The relief in an accounting proceeding is to force the defendant to divulge his activities so that a determination as to possible liability may be made. Money damages may never be awarded but the accounting must be made. Monetary relief is contingent upon the outcome of the accounting and therefore secondary. A claim to impose a constructive trust is made to prevent a defendant from absconding with money or property rightfully due the plaintiff and the relief granted in such an action is to control assets, determining the amount due the plaintiff has nothing to do with the injunctive relief sought.

The Courts have specifically held that these causes of action may be brought as an individual claim by a minority shareholder and fit within the exception in [BCL §623\(k\)](#). [*Lazar v. Robinson Knife Mfg. Co.*, 262 A.D.2d 968 \(4 Dept., 1999\)](#), [692 NYS2d 539](#) where the court permitted all three claims by a minority shareholder after a Buy-Out Option proceeding had commenced. See also, [*SBE 44 Wall, LLC v. New 44 Wall St., LLC*, 2013 NY Slip Op 32104\(U\)](#), [2013 Misc. 4011](#); [*Johnson v. Asberry*, 2019 Misc. LEXIS 3157](#), [2019 NY Slip Op 31690\(U\)](#).

The legal doctrine stated therein is further supported by rulings that in a closely held corporation, like Galloway, the majority shareholder owes a fiduciary duty directly to the minority shareholder, not just the corporation, so that these claims can be brought individually. See, [*Tierno v. Puglisi*, 279 A.D.2d 836 \(3 Dept., 2001\)](#); [*Richbell Info. Services, Inc. v. Jupiter Partners, LP*, 309 A.D.2d 288 \(1 Dept., 2003\)](#); [*Sina Drug Corp. v. Mohyuddin*, 2010 N.Y. Misc. LEXIS2404](#).

POINT IV

DEFENDANT'S MOTION PAPERS WERE DEFECTIVE AS A MATTER OF LAW BECAUSE DEFENDANT DID NOT PROVIDE COPIES OF ALL THE PLEADINGS.

[CPLR §3212](#) is clear and absolute. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. [CPLR §3212\[b\]](#). Failure to include pleadings renders the motion procedurally defective. [*Washington Realty Owner, LLC v. 260 Washington Street, LLC*, 105 AD3d 675.](#)

The rule is so absolute that failure to include pleadings in support of a motion for summary judgment requires that said motion be denied, regardless of the merits of the motion. [*Niles v County of Chautauqua*, 285 AD2d 988, 727 N.Y.S.2d 679 \(4th Dept. 2001\); *Deer Park Assocs. v. Robbins Store, Inc.*, 243 AD2d 443, 665 N.Y.S.2d 286 \(2nd Dept. 1997\); *Lawlor v County of Nassau*, 166 AD2d 692, 561 N.Y.S.2d 644 \(2nd Dept. 1990\); *Somers Realty Corp., v Big "V" Properties, Inc.*, 149 AD2d 581, 540 N.Y.S.2d 677 \(2nd Dept. 1989\); *Freeman v Easy Glider Roller Rink, Inc.*, 114 AD2d 436, 436-437, 494 N.Y.S.2d 351 \(2nd](#)

Dept. 1985). *Barber v. Cornell Univ. Coop. Extension of Orange County*, 37

Misc3d 1217 (Bartlett, J.)

Here, Defendant as the moving party failed to include the Amended Verified Answer (NYCEFS Doc 55) or Plaintiff's Verified Reply (NYCEFS Doc 57). Defendant's failure to do so is dispositive. The trial court, regardless of the merits of the motion, should have summarily denied the same.

CONCLUSION

For the reasons set forth herein, summary judgement should not have been granted to the Defendants in any respect. The Complaint should be reinstated in its entirety.

Dated: Goshen, New York
September 7, 2023

Yours, etc.,

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