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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,

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

FABRICANT LIPMAN & FRISHBERG
ATTORNEYS FOR PLAINTIFFS-APPELLANTS

Neal D. Frishberg
Digitally signed by Neal D. Frishberg
DN: cn=Neal D. Frishberg, o=Fabricant Lipman & Frishberg, PLLC, ou, email=nfrishberg@nfrishberg.com, c=US
Date: 2023.11.30 10:56:36 -05'00'

By: Neal D. Frishberg
One Harriman Square
P.O. Box 60
Goshen, NY 10924
Tel No. 845-294-7944
Fax No. 845-294-7889
Email – nfrishberg@nfrishberg.com

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The Answering Brief holds the Appellant's Brief and argument to rather harsh comment that it neglected to disclose to the Court adverse decisions, which, it is respectfully submitted is not justified. Such criticisms are more accurately applied to the Answering Brief, relying on decisions easily distinguished. These matters will be addressed in reply to the Respondent's Counter Statement of Facts and Argument.

The Answering Brief also attacks Appellant's interpretation of BCL §623, based upon a claim that we failed to cite supporting case law. However, Appellant's arguments are based on the virtually indisputable wording of the statute and any other interpretation would require terms of the statute to be impermissibly ignored. Of course, the Answer Brief offers no alternative interpretation and the cases it cites to hold differently from the Appellant's interpretation are not in point.

ARGUMENT

POINT I

THE RESPONDENT'S COUNTER STATEMENT OF FACTS ARE INACCURATE AND RELY ON DOCUMENTS NOT IN THE RECORD ON APPEAL

The Respondents Counter Statement of Facts Paragraphs 7 through 18 paraphrase a Letter of Intent dated April 10, 2007, asserting that the Appellant had failed to fulfil his obligations thereunder. However, the Letter of Intent was improperly relied upon for several reasons:

First, the Letter of Intent is not part of the Record on Appeal and in fact did not become part of the Supreme Court Record until June 21, 2023, approximately 18 months after the date of the Decision and Order appealed herein and the Respondents did not seek to have it added to the Record.

Second, in asking this Court to consider the terms of the Letter of Intent, then, it should have been at least candid enough to acquaint the Court with paragraph 1 thereof stating:

> "1.Non-Binding. Neither this nor any future communications or drafts shall constitute an offer, and nothing herein shall be binding upon either of us unless and until a final written stock purchase agreement is executed by us."

Third, the only binding agreement, the Shareholders Agreement dated September 1, 2008, (R., P 61-78 at Page 77, provides:

> "32. Prior Agreements, Complete Understanding. This Agreement cancels and supersedes any and all prior agreements and understandings, whether written or oral, if any, between the parties hereto and constitutes the complete understanding between the parties. No statement, representation, warranty or other covenant has been made by either party with respect hereto except as expressly set forth herein."

That provision eliminates the applicability of the Letter of Intent. The Answering Brief's argument that the provisions of the Letter of Intent were controlling with respect to the Parties obligations, was patently untrue.

Next, the Counter Statement of Facts, asserts that by negotiating the terms of the actually binding agreements between the Parties, a Stock Option Agreement, a Shareholders Agreement and the Employment Agreement, Plaintiff breached these agreements by not fully exercising his option to purchase shares of stock in Galloway Dental. I would think that the author of the Answering Brief was

sufficiently astute to know the difference between an option to purchase and a contract to purchase. Again, the Stock Option Plan is not part of the Record on Appeal and is irrelevant to the issues before the Supreme Court on the Defendants Motion for Summary Judgment. Worse yet, the Answering Brief quotes the Stock Option Plan and again fails to advise this Court that the Plaintiff had no obligation to purchase under the "Option". The operative clause under the Stock Option Plan states:

> "2. Grant of Option. Wiley hereby grants to Klein during the Option Period the right and option to purchase not more than five hundred (500) shares of stock in the Corporation, which are currently owned by Wiley under the terms and conditions of this Agreement."

The next inaccurate factual assertion appears in Paragraphs 64 and 65 of the Answering Brief asserting that under the Shareholders Agreement, upon consenting to the Asset Purchase Agreement Klein became obligated to "deliver necessary documents to Galloway" and to "sell all his shares less costs associated with such transaction." Neither are true. The operative provision of the Shareholders Agreement is Paragraph 3-c. It is what is known as a "Drag-Along" Agreement and its application is restricted to instances when a majority shareholder wishes to sell all of his share to a third party. It requires a minority shareholder to sell all of his

shares to the same third party who might not otherwise be unwilling to purchase and have to contend with a minority shareholder. It has no application when a majority shareholder, instead of selling shares in the corporation, simply sells the assets of the corporation. Under those circumstances, he does not need the cooperation of the minority shareholder. The provision in the Shareholders Agreement states:

> "3-c Notwithstanding anything to the contrary contained herein, in the event that Wiley accepts an offer to purchase all, but not less than all, of his shares from a bono fide and qualified third party, Wiley may send written Notice (the "Drag-Along Notice") to Klein specifying the name of the purchaser, the consideration payable per share and a summary of the material terms of such proposed sale. Upon receipt of a Drag-Along Notice, Klein shall be obligated to (i) sell all of his shares, free of any encumbrances, in the transaction contemplated by the Drag-Along Notice on the same terms and conditions as Wiley (including payment of all of his pro rata share of all costs associated with such transaction) and (iii) otherwise take all necessary action to cause the consummation of such transaction including voting his shares in favor of such transaction and not exercising any appraisal rights in connection therewith. Klein (I) further agrees to take all actions (including executing, acknowledging and delivering documents) in connection with consummation of the proposed transaction as may reasonably be requested by Wiley and (ii) hereby appoints Wiley as his attorney-in-fact to do the same on his behalf, such

> power being coupled with an interest and irrevocable."

Clearly, it is this provision to which the Answering Brief refers as the paraphrasing in the Brief mimics the terms of the provision. Just as clearly, the provision only relates to stock sales, not an asset sale, which was the transaction which occurred herein. Klein did not breach that provision, because it imposed no obligation of Klein with respect to an asset sale. Had it been a stock sale, for then the Purchaser would have paid Klein directly on September 4, 2018, and Klein would have been paid $120,000.00, less expenses, on that date, instead of having been paid only $30,000.00 of his share of the proceeds as of November of 2023

Next the Counter Statement of Fact states at Paragraph 66, "that it is undisputed that pursuant to the Shareholders Agreement, Klein promised and agreed to protect and preserve the goodwill and reputation of De. Wiley." However, the provision of the Shareholders Agreement purporting to impose that obligation is neither cited nor quoted. The only provision of the Shareholders Agreement vaguely addressing that assertion is Paragraph 21(R., Page 75) entitled Injunctive Relief and damages. In pertinent part it provides:

> "The shareholders acknowledge and agree that this Agreement, and the covenants contained herein, are intended to protect and preserve the legitimate business

> interests, including, but not limited to, the goodwill and proprietary interest of the Corporation and the shareholders."

The provision obligates a shareholder to "protect and preserve the legitimate business interests" not corporate theft. Nothing that the Answering Brief asserts Klein stated, if true, would breach that obligation. The truth or falsity of Klein's allegations in the Complaint of Wiley's theft of corporate assets has yet to be decided on the merits. This provision is not a gag order. Klein demanding reimbursement of his share of the corporate assets stolen by Wiley is not a breach of this provision or any other provision. If proven true Klein should be reimbursed. Only if proven false, does Wiley have a complaint.

Respondent in Paragraphs 77 to 79 of the Answering Brief makes the factual allegation that "on or about January 4, 2019, Klein's counsel wrote counterclaimants, this time demanding $260,000, and again threatening counterclaimants and containing false, serious and offensive accusations that they were thieves and embezzlers." (This firm did not represent Klein at that time and did not participate in drafting that letter, facts which the Answering Brief, again, chose to keep from this Court.). The letter was authored by Cynthia M. Collins, Klein's attorney at that time. None of this should be considered on this appeal as

the letter is not part of the Record on Appeal. In fact, the letter did not become part of the E-file record in Supreme Court below until June 21, 2023, some 18 months after the Record on Appeal was filed herein.

As quoted at Paragraph 79 of the Answering Brief, Ms. Collins invoking the wrath of the IRS might be considered inappropriate, and perhaps Ms. Collins should not have said that. However, that was not the act or statement of Klein and there is no evidence that Klein participated in writing that letter. The dispute is between Ms. Collins and the Respondents.

Moreover, the Decision and Order (R., Pages 8-12) appealed herein dismissed the Complaint based upon a determination that the causes of action alleged therein were precluded under BCL §623, because the claims were derivative or sought primarily money damages. The Decision and Order did not address the Plaintiff's possible breach of his obligations to the Defendants and the Defendants' motion did not seek that relief.

POINT II

WHETHER THIS APPEAL IS PRECLUDED BY THE JUDGMENT FILED ON SEPTEMBER 27, 2023, TURNS ON WHETHER TO DECISION AND

ORDER APPEALED HEREIN, NECESSARILY AFFECTED THE JUDGMENT

The Answering Brief at "Argument a.", claims that this appeal is subsumed in a judgment in this action, filed on September 27, 2023 (the "judgment"). In so arguing, the Answering Brief relies on *Matter of Aho*, 39 N.Y.2d 241 (1976) . It holds that, "whether such order necessarily affected such judgment". In turn in *Sigmond Strauss, Inc., v. East 149th Realty Corp*., 20 N.Y.3d 37, 42-47(2013), holds that "an intermediate order dismissing a cause of action necessarily affects the final judgment." *See also*, *Oakes v. Patel*, 20 N.Y.3d 633 (2013). Here the Decision and Order dismissed all of the causes of action alleged and thus, necessarily affected the Judgment.

This argument relies on a document - the alleged Judgment - that dehors the record. Since it is not part of the Record on Appeal it should have been raised, if at all, on a motion to dismiss, where the Judgment would have come before this Court. It is respectfully submitted that this argument only be considered upon the Judgment being properly brought before the Court.

In addition, the Judgment is based on motion sequences 8 and 9 which concerned whether Respondent was entitled to summary judgment on Respondent's counterclaim and attorneys' fees as the prevailing party. There is nothing in the

aforesaid judgment that refers to the Order that is the subject of this appeal which the lower court issued after granting Respondent's motion to dismiss Plaintiff's complaint.

POINT III

THE HOLDINGS IN *KINGSTON v. BRESLIN* DO NOT REQUIRE DISMISSAL OF THE COMPLAINT

At Argument Point b., the Answering Brief argues that the holdings in *Kingston v. Breslin*, 56 AD3d 430, 866 N.Y.S.2d 778 (2 Dept., 2008) are directly in point and require dismissal of the Complaint. However, *Kingston* is clearly distinguishable for several reasons:

First, the nexus of the three derivative causes of action dismissed in *Kingston* are an attack on the terms of the asset sale therein. Here, the Complaint does not attack the agreement to sell the corporate assets as unfair or improper. The nexus of the Complaint herein is that:

1. Wiley looted the corporate assets before and after the asset sale; and

2. Klein has not been distributed the sums due him from the asset sale.

The Complaint has nothing to do with enjoining, challenging or contesting the price in the sale. Accordingly, *Kingston*, has nothing to do with this case.

Second, all 3 causes of action dismissed in *Kingston* were alleged strictly as derivative claims where, as here, although not artfully pled, the claims are both derivative and personal. BCL §623(k) specifically allows personal claims for unlawful and fraudulent conduct injuring the minority shareholder, stating:

> ". . .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."

The holding in *Kingston* points out the distinction and why it does not bear on this case, stating:

> "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 corporate 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 Woodward Company and not on behalf of the plaintiff in his individual capacity." (*Citations omitted.*) On page 781.

The Answering Brief criticizes the Appellant for failing to cite *Kingston* as adverse authority. Instead, it should not have relied on *Kingston* as it is so easily distinguished.

The Answering Brief extends the same criticism with respect to *Walter J. Schloss Assocs. v. Arkwin Indus.*, 90 A.D.2d 129 (2 Dept., 1982), reversed on the dissenting opinion of J. Mangano, in *Walter J. Schloss Assocs. v. Arkwin Indus.*, 6 61 N.Y.2d 700 (1984). Here again the criticism is groundless for the same reasons as in *Kingston*. First, the claims in the that complaint had attacked the legitimacy of the terms of the merger, for which an appraisal and buy-out is the exclusive remedy. Second, that all of the Plaintiffs individual equitable claims, including for an accounting, had been withdrawn or were deemed withdrawn by implication.

Here, the Complaint sought personal equitable claims including an accounting, breach of fiduciary duty and imposition of a constructive trust, thus avoiding dismissal under either *Kingston* or *Schloss Assocs*. Furthermore, the Appellate Brief cites *Lazar v. Robinson Knife Mfg. Co.*, 262 A.D.2d 968 (4 Dept., 1999), which held that a minority shareholder's individual claims for equitable relief where not precluded by BCL §623(k), stating:

> "The complaint seeks as one of its primary requests equitable relief, i.e., rescission of the stock option plan, the imposition of a constructive trust upon the stock issued under the stock option plan and an accounting. Moreover, if plaintiffs establish that a breach of fiduciary duty occurred, then the actions of defendants are unlawful, and plaintiffs may be entitled to equitable relief. Because plaintiffs allege that the actions of defendants were unlawful or fraudulent and seek equitable relief, the action is not barred by the exclusivity provision in Business Corporation Law § 623 (k)." (*Citations omitted*.) At Page 968.

Respondent also cites *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*, 122 AD3d 444 for the proposition that a majority shareholder owes a fiduciary duty to a minority shareholder. None of those cases were distinguished in the Answering Brief.

The existence of a fiduciary duty of a majority shareholder to a minority shareholder, upon the breach of which, the minority shareholder is entitled to equitable relief, has been confirmed by the Court of Appeals in *O. Loengard, Jr., v. Santa Fe Industries, Inc.*, 70 N.Y.2d 262 (1987), holding:

> "Here, the nature of the relief sought is equitable. A claim based on a breach of the fiduciary obligation owed by the majority shareholders to the minority in forcing the minority to sell their shares in a freeze-out merger at a

> substantially undervalued price is essentially equitable in nature."

The Answering Brief also criticizes that the Appellant's Brief does not cite a case specifically supporting its interpretation of BCL 236 (e). However, it does not cite any case supporting a different interpretation. That is because research discloses that there are no cases interpreting that provision. This is an issue of first impression.

Importantly, the Answering Brief does not offer an alternate interpretation. Most likely because any interpretation of BCL 623 (e) adverse to the Appellant, would need to improperly ignore its wording. Its provision that ". . .he shall be reinstated to all his rights as a shareholder as of the corporate action . . . .", can have no other meaning that the Appellant with the asset sale concluded was entitled to seek the relief sought in the Complaint.

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
November 30, 2023

Yours, etc.,

FABRICANT LIPMAN & FRISHBERG, PLLC
Attorneys for Plaintiffs-Appellants
Office & P.O. Address
One Harriman Square
P.O. Box 60
Goshen, New York 10924
Tel.: (845) 294-7944

Neal D. Frishberg
Digitally signed by Neal D. Frishberg
DN: cn=Neal D. Frishberg, o=Fabricant Lipman & Frishberg, PLLC, ou, email=nfrishberg@nfrishberg.com, c=US
Date: 2023.11.30 10:57:15 -05'00'

By:_____
Neal D. Frishberg, Member