

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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LANA FRANCO and DANA NAVAN,

Plaintiffs,

-against-

TONI-ANN FARR, individually and as Personal Representative for JONNA GALASSO, deceased, and J-L-T-D INC.,

Defendants.
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Sherri L. Eisenpress, A.J.S.C.

DECISION & ORDER

Index No.: 031877/2020

(Motion # 2 and #3)

The following papers, NYSCEF documents numbered 35-88 were considered in connection with (i) Defendants' Notice of Motion for (1) an Order, pursuant to CPLR 3212, granting summary judgment in favor of Defendants and against Plaintiffs dismissing the complaint; (2) canceling the notice of pendency filed by Plaintiffs; and (3) such other and further relief as this Court may deem just and proper (Motion #2); and (ii) Plaintiffs' Notice of Cross Motion for an Order: (1) striking an affidavit of corrections relating to Defendant Toni-Ann Farr's deposition testimony; (2) pursuant to CPLR 3212, granting summary judgment on Plaintiffs' complaint; and (3) granting such other and further relief as this Court may deem just and proper (Motion #3).

Upon the foregoing papers, the Court now rules as follows:

Background

In May 2020, Plaintiffs, who are sisters, commenced this action alleging that their other sisters, Defendant Toni-Ann Farr (hereinafter "Farr") and Jonna Galasso

(hereinafter "Galasso")¹ wrongfully exercised control over Defendant J-L-T-D Inc. (hereinafter "JLTD"), a family real estate business, and misappropriated its assets to enrich themselves at the expense of and to the detriment of Plaintiffs.

In the complaint, Plaintiffs allege that JLTD was formed by the individual parties and Galasso on December 27, 1989, for the purpose of acquiring, operating and managing real estate investments; that the initials of their first names were included in the corporate name of JLTD; and that they each held a 25% ownership interest of JLTD. Plaintiffs allege that, shortly after JLTD was incorporated, JLTD acquired title to certain real property located at 11 Cypress Lane, Orangeburg, NY (hereinafter "11 Cypress Lane") via deed dated January 12, 1990. Plaintiffs allege that the individual parties and Galasso contributed equally to the purchase of the property. Plaintiffs further allege that, in October 1993, unbeknownst to them, JLTD was dissolved by proclamation due to the failure of Farr and Galasso to pay franchise taxes to the State of New York.

On August 9, 1999, JLTD conveyed title to 11 Cypress Lane to Farr and Galasso, as joint tenants with rights of survivorship via deed executed by Farr. Plaintiffs were not informed of the title transfer. It was not until late September 2018, after a probate proceeding was commenced to settle the estate of their parents, that Plaintiffs discovered the 1999 title transfer. Plaintiffs discovered that Farr and Galasso had been exclusively using and occupying 11 Cypress Lane. Thereafter, on July 19, 2019, Farr and Galasso conveyed the title to 11 Cypress Lane to Farr. This 2019 title transfer was performed without Plaintiffs' consent or authorization. After the transfer of title, Farr informed Plaintiffs that Farr was the sole owner of 11 Cypress Lane and would not pay Plaintiffs for her continued exclusive use and occupancy of the property.

¹ Galasso passed away on June 13, 2020, and Farr was appointed executor of Galasso's estate on October 28, 2021.

Plaintiffs asserted seven causes of action, including causes of action for breach of fiduciary duty, fraud, unjust enrichment, conversion, constructive trust, piercing the corporate veil, and injunctive relief. In June 2020, Defendants answered, raising various affirmative defenses. Defendants now move, among other things, for summary judgment dismissing the complaint. Plaintiffs oppose Defendants' motion and cross-move to strike an affidavit of corrections relating to Farr's deposition testimony and for summary judgment on their complaint.

The Parties' Contentions

In support of their motion for summary judgment, Defendants submitted an affidavit of Farr, who averred that she was the president of JLTD. According to Farr, the individual parties' parents (passed away in 2014 and 2018, respectively) formed several companies which invested in real estate during their lifetimes. The individual parties' mother Henrietta Galasso (hereinafter "Henrietta") was primarily in charge of running the companies, and the four sisters (i.e., plaintiffs, Farr and Galasso) did what they were told and never questioned Henrietta. In November 1989, Farr executed a contract of sale to purchase 11 Cypress Lane. In this regard, a copy of the contract of sale was submitted, which was signed by Farr as purchaser and listed a purchase price of \$207,000. Farr averred that, on December 27, 1989, JLTD was formed, and the individual parties' parents made Farr an officer of JLTD. JLTD was thereafter substituted for Farr as the purchaser of 11 Cypress Lane. A copy of a deed for 11 Cypress Lane was included in Defendants' motion papers. The deed is dated January 12, 1990 and lists JLTD as the grantee. Farr averred that she did not know why their parents formed JLTD and decided to have JLTD become the purchaser of 11 Cypress Lane.

Although JLTD was identified as the purchaser of 11 Cypress Lane, the individual parties' parents provided the funds for purchasing the property. In this regard, Defendants submitted documentary proof, including a closing statement for the purchase and copies of checks, indicating that Henrietta made a down payment of \$20,700 and that the remaining

funds paid to close on the purchase were all advanced by the individual parties' parents. Farr averred that she had been continuously residing at 11 Cypress Lane since January 15, 1990. In August 1999, the title to 11 Cypress Lane was transferred from JLTD to Farr and Galasso, as joint tenants with right of survivorship. According to Farr, it was Henrietta who decided to make the transfer, and Henrietta's attorney prepared the paperwork for the title transfer. In July 2019, the title to the property was transferred to Farr herself for estate planning purposes.

Farr further averred that there was no evidence that Plaintiffs ever had any ownership interests in JLTD and that 11 Cypress Lane had always been intended to be Farr's personal residence. According to Farr, the corporate kit for JLTD contained "blank shareholder certificates" and "a blank shareholder's agreement." "Nothing in the corporate kit was filled out." Plaintiffs never made any capital contributions to JLTD or gave any consideration for an ownership interest in JLTD. After Henrietta's passing and during the probate proceedings, Farr learned that JLTD had been dissolved by proclamation in 1993.

In support of their motion, Defendants further submit deposition testimony of Plaintiffs. According to Plaintiffs' deposition testimony, Plaintiffs testified that they did not recall if they had ever received a stock certificate for JLTD. Regarding contributions to JLTD, Plaintiff Lana Franco testified that she "just knew" that she made an investment of \$50,000 in JLTD. Franco testified that the \$50,000 was inherited money from her grandparents but testified that that money had never "come into [her] hands." Franco acknowledged that she did not have any documentation demonstrating that she made that \$50,000 investment, that she did not "personally contribute any cash" to JLTD, and that she did not make any other "monetary contributions" to JLTD over the years.

Similarly, Plaintiff Dana Navan testified that she invested \$50,000 in JLTD in about 1989 and that the \$50,000 was inherited money from her grandparents. Navan acknowledged that the \$50,000 did not come from her own funds, that she did not have any documentation showing that she made the \$50,000 investment, and that she did not recall if

she had made "any other monetary contributions to" JLTD. Franco was asked if she had ever been given any documents that demonstrated that she had an ownership interest in JLTD, and she answered, "No, I don't recall."

Plaintiffs further testified, during their depositions, that Farr and Henrietta "operated" and were "in charge" of JLTD. Plaintiffs testified that they were not employees or officers of JLTD and that they were not on the board of directors of JLTD. Plaintiffs had never attended a shareholder meeting or a meeting of the board of directors. Franco testified that she did not even know if a shareholder meeting was ever held. Franco testified that she was not personally involved in the formation of JLTD and was not involved in the purchase of 11 Cypress Lane. Since 11 Cypress Lane was purchased, Franco had visited the property about six or seven times, never paid any real estate taxes on the property, and never contributed funds toward the maintenance or renovations of the property.

Prior to commencing this action, Franco had never asked to review the books and records of JLTD, never demanded rent from Farr for her occupancy of 11 Cypress Lane, and never demanded payment out of proceeds from JLTD. Although Navan did ask Farr and their parents to review the books and records of JLTD "[i]n the beginning," Navan did not ask to review the books and records again "throughout the years." Navan testified that she only saw the closing documents for 11 Cypress Lane when it was purchased and acknowledged that Farr and her son were the only family members who had been residing at the premises. Navan also acknowledged that she never paid for anything associated with the property, such as maintenance, renovations and real estate taxes. Navan did not recall if she had ever demanded rent from Farr for her occupancy of 11 Cypress Lane and if she had ever demanded payment out of proceeds from JLTD. Navan, however, acknowledged that, prior to commencing this action, she had not demanded the return of her alleged investment in JLTD.

In addition, Defendants submit, among other things, (1) a document entitled "stock registration ledger," the content of which is blank, to support their allegation that no

shares of JLTD were ever issued; (2) a document indicating that JLTD was dissolved by proclamation in 1993; and (3) documentary proof showing that, by warranty deed dated August 9, 1999 and signed by Farr, as president of JLTD, the title to 11 Cypress Lane was transferred from JLTD to Farr and Galasso, as joint tenants with right of survivorship, and that, by bargain and sale deed dated July 11, 2019, the title to the property was transferred from Farr and Galasso to Farr herself. Defendants argue, as relevant here, that they have established their prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence that Plaintiffs have no ownership interests in JLTD.

In opposition to Defendants' motion and in support of their cross motion, Plaintiffs submit, among other things, the transcript of Farr's deposition taken on February 7, 2020. Farr testified that JLTD was formed to "own" 11 Cypress Lane and that the name of "JLTD" represented the initials of the four sisters' first names. Farr testified that she did not know the "proportionate ownership" for JLTD and did not "pay anything to buy [her] siblings out of" 11 Cypress Lane. Thereafter, the following exchange occurred:

"Q. Is it fair to say title [of 11 Cypress Lane] was acquired by J-L-T-D, Inc. -

A. Yes.

Q. - on January 12, 1990?

A. Yes.

Q. And at that time you and your siblings owned equal shares of J-L-T-D, Inc., correct?

A. I'm not sure.

...

(Whereupon, the last question was read back.)

A. Yes."

Plaintiffs further submit the transcript of Farr's deposition taken on February 8, 2022. Farr testified that she did not recall there ever being a shareholder meeting for JLTD. During the deposition, the following exchange occurred:

"Q. Who are the owners of J-L-T-D?

A. It was four girls.

Q. What were the shares of ownership by the four girls, in percentages; if you can?

A. Twenty-five percent each."

Plaintiffs submit Farr's affidavit of corrections, wherein Farr averred that she submitted the affidavit in lieu of an errata sheet to correct her deposition testimony taken on February 8, 2022. In the affidavit, Farr averred that her answer that "It was four girls" should be replaced with "I assume it was four girls," explaining that that was her "belief" and that she had not "seen any documentation to that effect." Farr also averred that her answer that "Twenty-five percent each" should be replaced with "I assume it was twenty-five percent each," explaining that that was likewise her "belief" and that she had not "seen any documentation to that effect."

Plaintiffs further rely, among other things, on Franco's affidavit, in which she averred that, at all relevant times, she had a 25% ownership interest in JLTD; that there were no shareholder agreements or bylaws for JLTD; that the individual parties never held meetings; that she never participated in the preparation or filing of tax returns for JLTD; and that she never received any "income, disbursements, or other form of compensation from JLTD." Plaintiffs submitted Navan's affidavit, wherein she similarly averred that she had a 25% ownership interest in JLTD; that there were no shareholder agreements, bylaws or meetings for JLTD; and that she never participated in the preparation or filing of tax returns for JLTD and never received any income or any other form of compensation from JLTD.

Plaintiffs contend that this Court should strike Farr's affidavit of corrections because the corrections sought to substantively change Farr's deposition testimony and Farr's stated reason that her original answer was her belief and that she had not seen any supporting documentation were inadequate to warrant the corrections. Plaintiffs submit that the conflict between Farr's original deposition testimony and the corrections created a credibility issue that cannot be resolved by summary judgment. Plaintiffs further argue that the individual parties' uncontroverted deposition testimony that Plaintiffs each had 25% ownership interest in JLTD is sufficient to establish, as a matter of law, that Plaintiffs have ownership interests in JLTD. Plaintiffs submit that, in the alternative, this Court should deny Defendants' motion for summary judgment because there is a triable issue of fact regarding Plaintiffs' ownership interests in JLTD.

In opposition to Plaintiffs' cross motion and in reply to Plaintiffs' opposition to Defendants' motion, Defendants submit an affidavit from Farr, who averred, among other things, that she "had thought that [Plaintiffs] might possibly have an ownership interest, since it [was] obvious that [their] parents named the corporation JLTD after [the] four [sisters]," but that she had seen no evidence that Plaintiffs ever had ownership interests in JLTD. Defendants also submit proof showing that, in 1997, Franco commenced an action, individually and as guardian of her infant daughter, against JLTD. Defendants allege that the 1997 action was commenced to recover for injuries sustained by Franco's daughter in a slip and fall accident.

Legal Analysis

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact (see Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The failure to do so requires a denial of the motion without regard to the sufficiency

of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Pizzolorusso v Metro Mech., LLC, 205 AD3d 748, 751 [2022]). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial (see Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124, 129 [2000]; Alvarez v Prospect Hosp., 68 NY2d at 324). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue (see Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 [1988]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, evidence is to be viewed in the light most favorable to the party opposing the motion, giving them the benefit of every favorable inference, and the Court should not pass on issues of credibility (see Fricano v Law Offs. of Tisha Adams, LLC, 194 AD3d 1016, 1017 [2021]; Torres v Jeremias, 283 AD2d 484 [2001]).

"The mere fact that the corporation did not issue any stock certificates to an individual does not preclude a finding that the individual has the rights of a shareholder. In the absence of a share certificate . . . a court must determine from other available evidence whether a putative shareholder in fact and law enjoys that status" (Kun v Fulop, 71 AD3d 832, 833 [2010] [internal quotation marks, brackets and citations omitted]; see Matter of Coven v Neptune Equities, Inc., 198 AD3d 643, 645-646 [2021]; Zwarycz v Marnia Constr., Inc., 130 AD3d 922, 923 [2015]). In this regard, "[t]he relationship between a corporation and its stockholders is contractual . . . ; to constitute one a stockholder a subscription or contract whereby the right to hold stock or upon some condition to demand stock and to exercise the rights of a stockholder is required" (Matter of Pappas v Corfian Enters., Ltd., 22 Misc 3d 1113[A], 2009 NY Slip Op 50109[U] [Sup Ct, Kings County 2009], affd 76 AD3d 679 [2010]; accord Kun v Fulop, 71 AD3d at 834).

Pursuant to Business Corporation Law § 504 (a), consideration for the issuance of shares "shall consist of money or other property, tangible or intangible; labor or services

actually received by or performed for the corporation or for its benefit or in its formation or reorganization; a binding obligation to pay the purchase price or the subscription price in cash or other property; a binding obligation to perform services having an agreed value; or a combination thereof."

Thus, a court should first "look for evidence that consideration has been paid for a stock interest, and for evidence that any proceeds of the enterprise have been distributed to the putative shareholder" (Matter of Pappas v Corfian Enters., Ltd., 2009 NY Slip Op 50109[U], at *4 [internal citations omitted]). "A court, in addition, may consider the conduct among the parties reflecting and in furtherance of status as shareholders; the managerial responsibilities borne by the putative shareholder; and how non-parties understand the relationship based upon their observation of the conduct among the parties" (id. at *4-5 [internal quotation marks, ellipses and citations omitted]). "[A]s to evidentiary matters generally, and particularly pertinent here, is the effect of the absence of documentary support for oral testimony" (id. at *5).

This Court finds that Defendants made a prima facie showing of their entitlement to judgment as a matter of law dismissing the complaint by submitting evidence that Plaintiffs have no ownership interests in JLTD. Defendants' submissions demonstrate that Plaintiffs paid no consideration for an ownership interest in JLTD: they did not make any capital contributions toward JLTD or the purchase of 11 Cypress Lane; never contributed funds toward the maintenance or renovations of 11 Cypress Lane; and did not perform any services for JLTD. Furthermore, Defendants' evidence shows that Plaintiffs did not engage in any conduct reflecting their alleged status as shareholders; rather, Plaintiffs admittedly were not involved in the operation of JLTD and never demanded any proceeds from JLTD to be distributed to them or set aside for them.

In opposition, Plaintiffs failed to raise a triable issue of fact. Contrary to Plaintiffs' contention, Farr's amended testimony reflected in her affidavit of corrections relating

to her deposition taken on February 8, 2022, should be considered in determining the existence of a triable issue of fact as to whether Plaintiffs have ownership interests in JLTD, as Farr did not substantively alter her deposition testimony and provided an adequate reason for the changes (see CPLR 3116 [a]; cf. Torres v Board of Educ. of City of N.Y., 137 AD3d 1256, 1257 [2016]). In opposition to Defendants' prima facie showing, Plaintiffs merely rely upon their conclusory and unsubstantiated allegations that they each invested \$50,000 in JLTD and have 25% ownership interest in JLTD and upon Farr's previously-asserted and admittedly-unfounded belief that Plaintiffs possessed ownership interests. This, without more, is insufficient to raise a triable issue of fact as to Plaintiffs' ownership interests (cf. Re/Max of N.Y., Inc. v Weber, 177 AD3d 910, 914 [2019]; French v French, 288 AD2d 256 [2001]).

The parties' remaining contentions, to the extent not expressly addressed herein, have been considered and deemed to be moot or lacking in merit.

Accordingly, it is hereby

ORDERED that Defendants' Notice of Motion (Motion #2) is GRANTED, Defendants are awarded summary judgment dismissing the complaint, and the Notice of Pendency filed on May 26, 2020, concerning 11 Cypress Lane, Orangeburg, New York is canceled; and it is further

ORDERED that Plaintiffs' Notice of Motion (Motion #3) is DENIED.

The foregoing constitutes the Decision and Order of this Court on Motion #2 and #3.

Dated: New City, New York
November 10, 2022



HON. SHERRIL EISENPRESS
Acting Justice of the Supreme Court

TO: All counsel via NYSCEF