

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 012391/11

MOTION DATE: Feb. 28, 2012
Motion Sequence # 002

JAY L. DEBLINGER, individually, and as a shareholder of SANI-PINE PRODUCTS CO. INC. and LEEMAR LEASING CORP., suing on behalf of himself and all other shareholders of SANI-PINE PRODUCTS CO. INC. and LEEMAR LEASING CORP. similarly situated, and derivatively on behalf of SANI-PINE PRODUCTS CO. INC. and LEEMAR LEASING CORP.,

Plaintiffs,

-against-

SANI-PINE PRODUCTS CO. INC., LEEMAR LEASING CORP. and H. CECILE DEBLINGER a/k/a HELEN CECILE DEBLINGER,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation..... X
Memorandum of Law..... X

Motion by defendant H. Cecile Deblinger to dismiss the complaint for lack of capacity or failure to state a cause of action is **granted** in part and **denied** in part.

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This is a shareholder derivative action on behalf of two closely held corporations. Plaintiff Jay L. Deblinger holds 1/3 of the stock of Sani-Pine Products Co. Inc. and Leemar Leasing Corp. Defendant H. Cecile Deblinger, Jay's sister, is also a 1/3 shareholder of both corporations. The remaining 1/3 interest in both companies is held by the other sister, Jo Ann Deblinger, who is not a party to the action. Sani-Pine was engaged in the business of selling disinfectants and cat litter. The corporation owned rental properties in Manhasset and Manhattan. Leemar was engaged in the business of leasing automobiles and also owned two rental properties in Manhasset. Although all three stockholders were officers and directors of the companies, Cecile was responsible for the operation of the businesses.

On December 21, 2007, the stockholders held a meeting by telephone and agreed to the liquidation of the corporations. It was further agreed that Cecile would offer the rental properties for sale and that, once a bona fide offer was received, any of the stockholders would have the right to purchase the property at that price.

Jay purchased the properties held by Leemar on June 20, 2008. The Sani-Pine Manhattan property was sold to a third-party on August 12, and the Sani-Pine Manhasset property was sold to a third-party on September 17, 2008. Approximately \$1.5 million was realized upon the sale of the Sani-Pine properties.

On February 2, 2010, Cecile brought a petition for the judicial dissolution of both Sani-Pine and Leemar on the ground that dissolution would be beneficial to the shareholders. Neither Jay nor Jo Ann objected to dissolution, but Jay reserved his right to assert breach of fiduciary duty claims against Cecile and requested that the claims be adjudicated in the dissolution proceedings.

By order dated August 19, 2010, the court granted the petitions and directed Cecile to submit separate judgments of dissolution for each corporation on notice to other shareholders. Because Jay's breach of fiduciary duty claims had not been alleged in detail, the court declined to exercise jurisdiction over the claims in the context of the dissolution proceeding. On September 27, 2010, the court issued final judgments of dissolution as to Sani-Pine and Leemar and directed that the property of each corporation be distributed to the shareholders on a 1/3 basis.

On December 7, 2010, Cecile made an initial distribution of assets and distributed to Jay \$776,916, representing his share of Sani-Pine, and \$100,000, representing his share of Leemar. Final distribution was made on April 4, 2011 after Cecile received confirmation that the judgments of dissolution had been filed by the Department of State.

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This breach of fiduciary duty action asserted on behalf of the corporations was commenced around November of 2011. Jay alleges that Cecile breached her fiduciary duty by 1) continuing to pay herself salary and a management fee between the time that the corporations ceased active business operations and the time their assets were distributed, 2) delaying the distribution of corporate assets, and 3) commencing “unnecessary” dissolution proceedings. Additionally, Jay alleges that Cecile failed to sell certain stock held by Sani-Pine in a timely fashion resulting in a loss to the shareholders.

Defendant moves to dismiss the complaint for lack of capacity and failure to state a cause of action. Defendant argues that because plaintiff characterized his claims as personal, in order to avoid having them decided within the dissolution proceedings, plaintiff is barred from asserting the claims as derivative by the doctrine of judicial estoppel. Additionally, defendant argues that plaintiff’s claims are barred by the business judgment rule and failure to serve a demand on the directors that the corporations bring the action.

The doctrine of inconsistent positions, or judicial estoppel, precludes a party, who has taken a position in a prior legal proceeding and secured a favorable judgment, from assuming a contrary position in another action simply because its interests have changed (*Rosario v Montalvo & Son Auto Repair*, 76 AD3d 963 [2d Dept 2010]). In the present action, Jay is asserting derivative breach of fiduciary duty claims, which he originally characterized as individual in nature. However, because the court declined as a matter of discretion to exercise jurisdiction over the breach of fiduciary duty claims in the dissolution proceeding, Jay did not obtain a judgment in his favor. Accordingly, the doctrine of judicial estoppel does not bar the present action.

The business judgment doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes (*Consumers Union v New York*, 5 NY3d 327, 372 [2005]). Such matters include questions of policy of management, expediency of contracts or action, adequacy of consideration, and lawful appropriation of corporate funds to advance corporate interests (Id).

The court concludes that Cecile’s decision to seek dissolution of Sani-Pine and Leemar, the timing of her distribution of the corporate assets, and her decision to hold and then sell Sani-Pine’s stock were all taken in good faith and in the exercise of honest judgment. Thus, the business judgment rule bars judicial inquiry into those actions.

Defendant's motion to dismiss the complaint for failure to state a cause of action is **granted** to the extent that plaintiff asserts breach of fiduciary duty claims based upon dissolution of the corporations, delay in distributing assets, and delay in sale of Sani-Pine's stock.

The court will not undertake to review the fairness of official salaries, at the suit of a shareholder attacking them as excessive, unless wrongdoing and oppression or possible abuse of a fiduciary position are shown (*Marx v Akers*, 88 NY2d 189, 203 [1996]). However, the court may review the salary of an officer or director at the instance of the corporation or a shareholder in extreme cases, such as where the directors draw the entire corporate income as salary and leave nothing for the shareholders (Id). The compensation rates must be excessive on their face or plaintiff must allege other facts which call into question whether the compensation was fair to the corporation when approved, the good faith of the directors setting those rates, or that the decision to set the compensation could not have been the product of valid business judgment (Id).

Plaintiff alleges that after the corporations ceased doing business Cecile continued to draw \$40,000 from each corporation, for a total official salary of approximately \$80,000. This salary is clearly not excessive on its face. However, because of the acrimony between the parties, it may be inferred that Cecile's decision to continue to draw her salary after corporations ceased doing business was not taken in good faith.

Demand is futile, and excused, when the directors are incapable of making an impartial decision as to whether to bring suit (*Bansbach v Zinn*, 1 NY3d 1 [2003]). Demand is excused when a majority of the board is interested in the challenged transaction, the board did not fully inform itself of the transaction to the extent reasonably appropriate, or the transaction is egregious on its face.

Clearly, Cecile was interested in her management salary while the dissolution was pending. Accordingly, it would have been futile to demand that Cecile bring an action challenging her own compensation.

Defendant's motion to dismiss for failure to state a cause of action is **denied** as to plaintiff's excessive compensation claim.

So ordered.

Dated

11 April 2012

ENTERED

APR 13 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Stephen A. Bucaria
J.S.C.