

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

STEPHAN B. GLEICH,

INDEX No. 010266/12

Plaintiff,

MOTION DATE: Nov. 15, 2012
Motion Sequence # 001, 002

-against-

STEPHEN J. HAENEL and ICELAND
INCORPORATED,

Defendants.

The following papers read on this motion:

Order to Show Cause..... X
Cross-Motion..... X
Affirmation in further Support..... X
Reply Affirmation..... X

Motion by plaintiff Stephan Gleich for a preliminary injunction restraining defendants from issuing or transferring shares of stock in Iceland Incorporated is **denied**. Cross motion by defendants to dismiss the complaint on the ground of res judicata and collateral estoppel is **granted** in part and **denied** in part.

This is an action for a declaratory judgment that plaintiff is the owner of 50 % of all issued and outstanding common stock of defendant Iceland Incorporated. The corporation was formed for the purpose of operating an indoor recreational ice skating facility in New Hyde Park.

Plaintiff Stephan Gleich is an attorney who began representing defendant Stephen Haenel in 1974. Gleich alleges that when Iceland was formed, Haenel's wife, Jacquelyn, who is now deceased, held 47 % of the stock, and Gleich held a 3 % interest.

In December 1994, the mortgage on Iceland's property was being foreclosed. Gleich alleges that Haenel agreed to grant Gleich a 50 % interest in Iceland as payment for legal fees involved in defending the foreclosure action and filing a Chapter 11 bankruptcy petition on behalf of the corporation.

Iceland's second amended plan of reorganization provided that new stock was issued 81 % to Jacquelyn and 19 % to Haenel. The plan also provided that plaintiff was to be the Assistant Secretary of the corporation. The cost to the "insiders" of the new stock was to be not less than \$40,000. (Defendants' Ex B). Gleich alleges that he contributed \$15,000 towards the cost of funding the plan of reorganization. The plan of reorganization was confirmed by the Bankruptcy Court on December 21, 1995.

Gleich alleges that in April, October, and December of 2008 Iceland paid him a total of \$20,000, purportedly as a profit distribution based upon his 50 % interest. Gleich alleges he continued as an employee of Iceland, dealing with "business and legal issues." Nevertheless, Haenel repudiated the agreement to grant him a 50 % interest in Iceland on March 1, 2010.

On October 20, 2010, Gleich brought a special proceeding seeking judicial dissolution of Iceland on the ground of deadlock among directors or shareholders (See BCL § 1104). By order entered April 8, 2011, Justice Adams dismissed the proceeding for lack of standing based upon a finding that Gleich was not the holder of 50 % of the voting shares. Justice Adams reasoned that the alleged oral agreement to grant Gleich a 50 % share interest was "in direct contravention" of the Bankruptcy Court plan of reorganization and therefore unenforceable. Justice Adams' order was affirmed by the Appellate Division, Second Department (*Matter of Iceland, Inc.*, 97 AD3d 579 [2d Dept 2012]).

Following the affirmance by the Appellate Division, Gleich brought the present action. In his first cause of action, plaintiff seeks a declaratory judgment that he is a 50 % shareholder and specific performance of the alleged agreement to issue him 50 % of the shares. In the second cause of action, plaintiff seeks to impose a constructive trust on half of Haenel's shares. In the third cause of action, plaintiff seeks an accounting with respect to the affairs of Iceland. In the fourth cause of action, plaintiff sues for damages for breach of the agreement to grant him a 50 % stock interest. In the fifth cause of action, plaintiff asserts a claim for unjust enrichment.

Plaintiff seeks a preliminary injunction restraining Haenel from issuing or transferring any shares of Iceland. Defendants cross move to dismiss the complaint based upon res judicata and collateral estoppel. In opposition, plaintiff argues that the dismissal of his dissolution proceeding for lack of standing was not a final judgment on the merits.

Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action (Landau v LaRossa, Mitchell, 11 NY3d 8, 12 [2008]). As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction are barred, even if based upon different theories or if seeking a different remedy. The dismissal of plaintiff's corporate dissolution proceeding is a final judgment on the merits with respect to plaintiff's claim that he is a 50 % shareholder of Iceland. Thus, all of plaintiff's claims predicated upon his being a 50 % shareholder of Iceland are precluded and must be dismissed. Defendants' motion to dismiss the complaint based upon res judicata and collateral estoppel is **granted** as to plaintiff's first, second, third, and fourth causes of action.

An action for unjust enrichment is based upon an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned (IDT Corp. v Morgan Stanley, 12 NY3d 132, 142 [2009]). Justice Adams' order, declaring that plaintiff is not a 50 % shareholder of Iceland, does not preclude an action against the corporation for unjust enrichment. Giving plaintiff the benefit of every possible favorable inference, the court must assume that plaintiff performed valuable services for Iceland which were not compensated by the 2008 distributions. Accordingly, defendants' motion to dismiss based upon res judicata and collateral estoppel is **denied** as to plaintiff's claim for unjust enrichment.

Because plaintiff has an adequate remedy at law, his motion for a preliminary injunction is denied. Defendants shall answer the complaint within 20 days of the date of this order.

A Preliminary Conference has been scheduled for February 22, 2013 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated JAN 02 2013


J.S.C.

ENTERED

JAN 07 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE