

NYSCEF DOC. NO. 157

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Disp x Dec Seq. No. 5 Type SJ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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WILLIAM JACOBS, individually and
derivatively on behalf of WESTCHESTER
INDUSTRIAL COMPLEX, LLC,

Plaintiff,

-against-

Index No. 70359/2014

DECISION AND ORDER

WESTCHESTER INDUSTRIAL COMPLEX, LLC,
CHARLES CARTALEMI, JOAN CARTALEMI, and
DAN-NIC-CAR, LLC

Defendants.

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The following papers numbered 1 to 6 were read on this
motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Rule 19-a Statement, Affirmation and Exhibits ¹	1
Memorandum of Law	2
Affidavit and Exhibits in Opposition	3
Memorandum of Law	4
Response to 19-a Statement	5
Reply Memorandum of Law	6

¹Plaintiff argues that defendant's motion should be denied because it relies only on the affirmation of counsel. This is inaccurate. The affirmation serves to attach plaintiff's deposition testimony, the only facts on which defendant relies. This is adequate.

Defendant Dan-Nic-Car, L.L.C. ("movant") bring its motion seeking to dismiss the remaining claim in this action. This Court previously issued a Decision and Order dated July 6, 2016 which held that the sixth cause of action, which alleged that movant aided and abetted former defendant Charles Cartalemi in his breaches of fiduciary duty to plaintiff, "appears not to be a derivative claim and, as such, remains viable." The Court noted that "If it turns out that this claim inures solely to the benefit of WIC,² then defendants may later make a motion for summary judgment." This is exactly what movant now does.

As the Court previously stated, a claim is derivative when it seeks relief on behalf of a corporate entity. *Rodolico v. Rubin & Licatesi, P.C.*, 112 A.D.3d 608, 609, 977 N.Y.S.2d 264, 266 (2d Dept. 2013) ("for a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment."). The Court held that plaintiff, a former member of WIC, can no longer maintain any derivative claims on WIC's behalf. Plaintiff, naturally, disagrees, and has appealed this finding.

Plaintiff argues that his remaining claims against movant are not derivative, but direct because "by causing WIC to make payments of inflated principal and interest to [movant] on

²"WIC" is the company that plaintiff and Cartalemi co-owned, Westchester Industrial Complex, LLC.

account of the improperly assigned SunLife Mortgage, Cartalemi is in fact paying himself WIC distributions without making corresponding distributions to Jacobs."

"It is black letter law that a stockholder has no individual cause of action against a person or entity that has injured the corporation. This is true notwithstanding that the wrongful acts may have diminished the value of the shares of the corporation, . . . or that the wrongdoer may ultimately share in the recovery in a derivative action if the wrongdoer owns shares in the corporation." *Serino v. Lipper*, 123 A.D.3d 34, 39-40, 994 N.Y.S.2d 64, 68-69 (1st Dept. 2014). The First Department went on to explain that "An exception exists, however, where the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation. This is a narrow exception, [which] must be factually supportable by more than complaints that conflate his derivative and individual rights." *Id.* As the *Serino* Court explained,

in order to distinguish a derivative claim from a direct one, the court considers (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually). If there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action. On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand.

Id. at 40, 994 N.Y.S.2d at 69.

In order to determine if this distinction between individual harm and harm to WIC exists in this matter, the Court has reviewed the entirety of plaintiff's deposition transcript. At his deposition, plaintiff testified that movant's wrongdoing included (1) overcharging interest to WIC (the interest "was charged to WIC;" "WIC paid nonmarket interest"); (2) taking a mortgage that it should not have (instead of WIC being "an entity that had no debt, it had a mortgage on it. That affected its credit."); (3) causing WIC to overpay Cartalemi's wife and daughter for seriously substandard services.

Plaintiff testified that he has personally been harmed by these improper actions because "the value of [his] investment in WIC has declined because assets of WIC, cash, have gone out inappropriately. . . which decreases the value of [his] ownership interest." Plaintiff later explained that if Cartalemi was performing poorly as a manager, but getting paid therefor, he would "have less complaint about that, because he is not getting personally enriched, right. . . . But if he's paying his wife, then he is personally taking money out of my pocket." These descriptions of the harm are all classic derivative scenarios; in each instance, the harm is suffered by WIC in the first instance. Plaintiff is only harmed because WIC had been harmed. See *Elenson v. Wax*, 215 A.D.2d 429, 429, 626 N.Y.S.2d 531, 532 (2d Dept. 1995) (there is "no individual cause of action to recover

damages for a wrong against a corporation, even if that shareholder loses the value of his investment. . . . Allegations of mismanagement or diversion of assets by officers or directors for their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually.”).

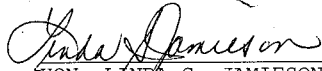
The cases cited by plaintiff do not require a different result. In *Appell v. L.A.G. Corp.*, 2008 WL 2809326 (Sup. Ct. NY Co. 2008), the plaintiff’s claims inured to him personally because the other owners used the corporation for their own benefit, and cut the plaintiff out of certain corporate opportunities. Similarly, in *Gjuraj v. Uplift Elevator Corp.*, 110 A.D.3d 540, 973 N.Y.S.2d 172 (1st Dept. 2013) the plaintiff had “standing to bring his breach of fiduciary duty claims as direct, as well as derivative, causes of action, since defendants’ freezing him out of the corporation and failing to pay him his share of the profits harmed him individually, and he would receive the benefit of any recovery.” That is not what happened here, where the alleged wrongdoing was done by movant to WIC, not to plaintiff, and plaintiff suffered only to the extent that “the value of [his] investment in WIC has declined.”

Accordingly, the Court finds that the remaining cause of action is also derivative, and should be dismissed. The Court

need not address the statute of limitations or other theories upon which movant also seeks dismissal.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 7, 2017



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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