

NYSCEF DOC. NO. 170

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

Disp _____ Dec __x__ Seq. No. 4__ Type SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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

Plaintiff,

-against-

Index No. 65701/2012

DECISION AND ORDER

CHARLES CARTALEMI and WESTCHESTER
INDUSTRIAL COMPLEX, LLC,

Defendants.

-----X

The following papers numbered 1 to 8 were read on this
motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Rule 19-a Statement	3
Affidavit and Exhibit in Opposition	4
Response to 19-a Statement	5
Memorandum of Law in Opposition	6
Reply Memorandum of Law	7
Sur-Reply Affidavit	8

Defendants' motion seeks summary judgment dismissing the
action on the basis that plaintiff lacks standing to maintain his

derivative claims in this action because he has withdrawn as a member of Westchester Industrial Complex, LLC ("WIC").

This Court has found, in the related action filed by plaintiff under Index No. 70359/2014, that because plaintiff is no longer a WIC shareholder, he cannot bring an action for any derivative claims. The Court thus dismissed all of the derivative claims (as well as all of the duplicative claims) in that action. The Court need not repeat itself, but finds that the same result must apply here.

The Court examines the complaint in this action, to see what claims should be dismissed. First, the Court notes that in April 2015, plaintiff agreed to narrow his claims to only (1) breach of fiduciary duty for Cartalemi's use of space for his own purposes; (2) breach of fiduciary duty based on Cartalemi's payment of compensation to himself and members of his family; and (3) breach of fiduciary duty for Cartalemi's failure to obtain insurance. All of these claims are derivative, and all are dismissed. See *Elenson v. Wax*, 215 A.D.2d 429, 429, 626 N.Y.S.2d 531, 532 (2d Dept. 1995) ("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.").

This is not the end of the inquiry, however. There are certain claims that plaintiff asserted in the Index No.

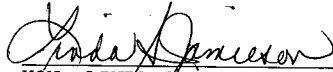
70359/2014 action, which the Court dismissed as duplicative of claims in this action. The Court will not dismiss these claims in this action based upon the stipulation, after having dismissed them in the other action. That would not be just. The Court thus allows the first cause of action, for an accounting, and the third cause of action, for a receiver, to survive this motion.

The second cause of action, for breach of fiduciary duty and punitive damages, is entirely derivative. See *Yudell v. Gilbert*, 99 A.D.3d 108, 114, 949 N.Y.S.2d 380, 384 (1st Dept. 2012) ("plaintiffs' claim for breach of fiduciary duty is derivative, because any pecuniary loss plaintiffs suffered derives from a breach of duty and harm to the business entity."). It is thus dismissed. The fourth cause of action, which seeks a judgment declaring that defendant holds the proceeds from the operation of WIC in trust for plaintiff, is also derivative. The injury, if any, is to WIC, and not to plaintiff himself. See *Glenn v. Hoteltron Sys., Inc.*, 74 N.Y.2d 386, 392 (1989) ("the diversion of Ketek's corporate assets by Schachter for his own profit resulted in a corporate injury because it deprived Ketek of those profits. Kulik, the innocent shareholder, was injured only to the extent that he was entitled to share in those profits. His injury was real, but it was derivative, not direct."). Similarly, the fifth cause of action, for waste, is also derivative and must be dismissed.

To address a statement made by plaintiff in his sur-reply affidavit, the Court finds that plaintiff may not "enlarge" any of his claims in this action. There are certainly enough actions pending between these parties to encompass all of plaintiff's claims.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
June 27, 2016


HON. LINDA S. JAMIESON
Justice of the Supreme Court

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