MEMORANDUM

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **Leonard Livote** Commercial Division Part A.
Acting Supreme Court Justice

Chun You Cheng and Chiu Ming Yang Cheng, individually and as shareholders of the Garden View Ltd, on behalf of themselves and all other shareholders of Garden View Ltd similarly situated, and in the right of Garden view Ltd.,

Plaintiffs,

-- against --

Roger Yang, as Administrator of the Estate of Mu-Chiao Yang, Hsiu-Lan Yang, A.J. Chan, Ju Yi Garden LLC, Dahlia Realty and Garden View Ltd.,

Defendants.

Index No: 701690/12

Decision and Verdict

A bench trial was held on June 27-28, 2019, July 8-12, 2019, July 26, 2019, July 31, 2019 and August 1, 2019. The Court was both the finder of facts and the determiner of questions of law. The Court considered the testimony of the witnesses, gave weight to that testimony, and generally determined the reliability of the witnesses' testimony (*see Horsford v. Bacott*, 32 AD3d 310, 312 [1st Dept.2006]). Furthermore, the Court made credibility determinations on a case-by-case basis, wherever necessary and appropriate to do so *(see Noryb Ventures, Inc. v. Mankovsky*, 47 Misc.3d 1220(A), 1220A [Sup.Ct. N.Y. Co.2015]). Upon the evidence found to be credible, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

Plaintiff brings the within derivative action seeking, inter alia, a declaratory judgment declaring the ownership interests of the parties.

Defendant Garden View Ltd. ("GVL") is a closely held real estate holding and management corporation currently managed by Defendant Hsiu-Lan Yang ("Tracy"), with the assistance of her son, nominal-Defendant Roger Yang. Plaintiff Chun You Cheng ("Cheng") is a Taiwanese citizen and resident. Plaintiff Chiu-Ming Yang Cheng ("Chiu-Ming") is also a Taiwanese citizen and resident and is the wife of Plaintiff Cheng. Chiu-Ming is also the younger sister of decedent Mu-Chiao Yang a/k/a Mark Yang.

Defendant Tracy is a citizen and resident of Queens County and, is Mark Yang's widow. Defendant Roger Yang ("Roger"), the son of Mark and Tracy, is a nominal defendant, sued in his capacity as the Administrator of the Estate of Mu-Chiao Yang ("Mark"). Defendant AJ Chan ("AJ") is Tracy's father, Roger's grandfather, and was Mark's father-in-law. AJ resides in Taiwan.

Defendant Dahlia Realty is a real estate brokerage company formed in 2004. Until his death, Mark Yang, a licensed real estate broker, was the sole owner of Dahlia Realty. Defendant Ju Yi is a limited liability company that owns two commercial spaces purchased from GVL. Ju Yi is owned by non-parties to this litigation, all siblings of Defendant Tracy Yang.

In 1998 Mark, Cheng and Cheng's brother, Chun Kung Cheng ("Kung," a nonparty) orally agreed to pool their money to build and operate a hotel in Flushing, Queens. After locating land overlooking the Queens Botanical Gardens, the men formed GVL as a vehicle to hold title to the land and construct and operate their hotel. The corporation was authorized to issue 200 shares of no par value stock. It is undisputed that no stock was ever issued as provided for in the corporate bylaws, and no other corporate formalities of any kind were ever followed. Although the three men contemplated equal 1/3 ownership interests in GVL, they orally agreed that ownership percentages would ultimately be determined upon the Hotel's completion based upon the actual amount of capital each person contributed. The three men further agreed that because of his experience in and familiarity with real estate development, the hotel industry, and the United States, Mark Yang would manage the joint venture Hotel Project and maintain its books and records, including construction expenses and tax returns.

The parcel of land for the Hotel Project was located across the street from the Queens Botanical Gardens. At a closing on June 22, 1998, the land was purchased for approximately $2.3 Million, with Cheng and Kung signing the initial contract for the purchase and providing the initial capital for the Hotel Project's purchase of the land.

In early 2000, Kung decided to leave the Hotel Project. At the time of Kung's departure, Kung, Yang and Cheng calculated the exact amount that had been contributed by the two brothers. The documentary evidence established that at the time of Kung's departure, the two brothers had contributed $3,516,964, of which $16,964 was returned to Kung in a check, making the combined contribution of Kung and Cheng in June 2000 $3.5 Million. Of this $3.5 Million, it was agreed that $1 Million represented Kung's equity investment that would be divided equally among the two remaining investors in the hotel venture. Cheng and Yang agreed that they would divide responsibility for the return of Kung's $1 Million equity investment equally amongst themselves, and that each would ultimately invest one-half of the capital necessary as equal partners to construct the hotel.

As with the first oral agreement, although Cheng and Mark Yang contemplated equal 50% ownership interests in GVL upon completion of the Hotel, they again agreed that ownership percentages would ultimately be determined based upon the actual amount of capital each person

contributed.

Shortly after the second oral agreement, the entire Hotel Project, and the reason for the joint venture/partnership, fell apart: In July 2000, the New York City Building Department unexpectedly revoked the building permit for the Hotel Project as the result of a zoning issue. The construction project halted between July 2000 and April 2001, while Mark sought out and ultimately retained a new architect, Michael Kang, R.A., who submitted new building-plans for the construction and development of a mixed use residential and commercial building that could be developed and thereafter managed as a condominium.

In September 2000, Cheng expressed to Mark his desire to have his investment returned and that he had no interest in owning condominiums and that he needed his $3 Million back to repay his creditors. Cheng nevertheless agreed with the plans to move forward with the Condominium Project because funds were not available in GVL to repay him. On May 11, 2001, new plans were filed which specified that the building would become a 14-story "mixed-use" condominium apartment building, with five retail stores on the ground floor. In addition, the number of stories changed from ten to fourteen.

In 2003, GVL obtained a construction loan from Industrial and Commercial Bank of China, Ltd. ("ICBC"), in the face amount of $8 Million. Mark, Tracy, Cheng and Chiu-Ming all personally guaranteed the Loan. The loan proceeds were delivered in tranches, as the funds were needed by GVL. The Construction Loan was insufficient to cover GVL's construction expenses in connection with the Condominium Project. Accordingly, AJ invested approximately 4.5 million dollars from May of 2000 through June of 2005. Mark promised AJ an equity interest in the property.

Construction of the Building was substantially completed in 2004. A certificate of occupancy was issued for the Building on July 15, 2004. In November, 2004, GVL filed a First Amendment to the Offering Plan, substituting Dahlia as selling broker for GVL. Mark Yang, through Dahlia, began marketing condominiums and Dahlia began receiving commissions for closed sales. Dahlia acted as the selling broker for all transactions not involving Tracy's family members. Commissions on arms-length sales to non-family members totaled $741,410, which represented 5.2% of the sold units' total purchase price. Of this amount, $230,063 was paid to Li Jeng Chen, a third-party real estate agent/broker.

Cheng returned to New York on June 27, 2005 and stayed for over one week at the time the first closings on the initial sales of units were taking place. He again returned to New York on September 29, 2005 and remained until October 20, 2005. During that time period Cheng was meeting with Mark Yang and asking for his money back. During these visits, Mark informed Cheng that the cost for the construction of the Building totaled $23 Million, as established by a faxed letter from Cheng to Mark confirming this fact.

Cheng initially objected to AJ being made an equity member, but acquiesced and, on

October 10, 2005, Cheng and Mark executed a memorandum regarding profit sharing. It states: "AS PER OUR AGREEMENT, THE PROFIT SHARING FROM GARDEN VIEW LTD., FOR CHUN YOU CHENG & CHIU MING YANG CHENG HAS BEEN CHANGED FROM ORIGINAL 1/2 TO 1/3."

Cheng received payments from GVL which amounted to $3,954,121. Cheng also received payments from defendants which amounted to $713,000. In addition, Cheng received the use of an apartment which was held off the market for him to use when he visited New York. The rental value of this apartment was $578,880.

Defendants received payments from GVL in the amount of 1,959,382. During the time period from June 2005 through November 2011, 7 condo units were transferred to defendants' family members at a discount of $281,176.00.

Defendants created Dahlia Realty to market and sell the condos. Dahlia received commissions in the amount of $741,410.00, and, of those commissions, $230,063.00 were paid to Li Jeng Chen, a third party broker. The remainder, $511,176.00, was paid to Dahlia. However, Dahlia charged GVL a commission of 5% rather than the market rate of 3%. Thus, Dahlia was paid excess commissions in the amount of $204,539.

Defendants provided four rent-free units to family members that deprived GVL of income in the amount of $1,908,000.00.

GVL also made donations on behalf of defendants in the amount of $208,415.00, and repaid non-business related expenses on behalf of defendants in the amount of 434,062.00

GVL made, on behalf of defendants, pension and life insurance payments in the amount of 1,693,960.00.

To the extent that plaintiffs had knowledge of these payments, they acquiesced to them as part of the defendants share of the profits because all parties still expected to arrive at an amicable resolution.

CONCLUSIONS OF LAW

In this case, the parties invested millions of dollars in the construction of a multi-story building. However, they did so with less paperwork than would accompany the sale of a single family home and a complete disregard of corporate formalities. Thus, the first question before the Court is to determine the scope of the parties agreement.

In *Res Exhibit Services, LLC v Genesis Vision, Inc.*, the Fourth Department stated:

"[i]t is well settled that, "[i]f an agreement is not reasonably certain in its material terms,

> there can be no legally enforceable contract" (*Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 N.Y.2d 475, 482 [1989], rearg. denied 75 N.Y.2d 863 [1990], cert. denied 498 U.S. 816 [1990]; *see Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91 [1991]; *Joseph Martin, Jr., Delicatessen v. Schumacher*, 52 N.Y.2d 105, 109 [1981]). "[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr., Delicatessen*, 52 N.Y.2d at 109; *see 166 Mamaroneck Ave. Corp.*, 78 N.Y.2d at 91). Nonetheless, the "doctrine of definiteness" should not be applied rigidly, and "[s]triking down a contract as indefinite and in essence meaningless 'is at best a last resort' " (*166 Mamaroneck Ave. Corp.*, 78 N.Y.2d at 91; *see Cobble Hill Nursing Home*, 74 N.Y.2d at 482–483). "Thus, where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain" (*166 Mamaroneck Ave. Corp.*, 78 N.Y.2d at 91; *see Joseph Martin, Jr., Delicatessen*, 52 N.Y.2d at 110)"

(155 AD3d 1515, 1517 [4th Dept 2017]).

In the instant case, there was undoubtably an intent to be bound. However, many essential terms of the contract were unstated, and the certainty of an agreement was replaced by trust arising out of the familial relationship. However, the trust dissipated upon the death of Mark Yang.

"Where the parties have completed their negotiations of what they regard as essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement, if some objective method of determination is available, independent of either party's mere wish or desire" (*Metro–Goldwyn–Mayer v. Scheider*, 40 N.Y.2d 1069, 1070–1071 [1976]). "Such objective criteria may be found in the agreement itself, commercial practice or other usage and custom' " (*id.* at 1071).

The crux of this case is who owns what percentage of GVL. The sixth cause of action in the complaint seeks a declaratory judgment of the parties ownership percentages.

In the instant case, the agreement was that the ownership percentages would ultimately be determined based upon the actual amount of capital each person contributed. Consistent with this agreement, and the evidence of contributions, the October 10, 2005 memorandum was executed. Thus, the individual plaintiffs, Chun You Cheng and Chiu MingYang Cheng are one-third owners, defendant AJ Chan is a one-third owner and the defendants Hsiu-Lan Yang and Roger Yang, as Administrator of the Estate of Mu-Chiao Yang are one-third owners.

Having determined the ownership, the payments made to the parties must be accounted for. Defendants believed that the payments made to plaintiffs were part of a buyout and that the

various payments and benefits that defendants received were made in lieu of formal distributions to avoid taxes. However, there was no meeting of the minds on a buyout or dissolution. Accordingly, as a matter of equity, these payments shall be treated as constructive dividends to the parties.

A constructive dividend arises '[w]here a corporation confers an economic benefit on a shareholder without the expectation of repayment, * * * even though neither the corporation nor the shareholder intended a dividend.' " (*Hood v. Commissioner*, 115 T.C. 172, 179, 2000 WL 1206813 (2000) (quoting *Magnon v. Commissioner*, 73 T.C. at 993–994)). " 'The crucial concept in a finding that there is a constructive dividend is that the corporation has conferred a benefit on the shareholder in order to distribute available earnings and profits without expectation of repayment.' "(*Truesdell v. Commissioner*, 89 T.C. 1280, 1295, 1987 WL 258105 (1987) (quoting *Noble v. Commissioner*, 368 F.2d 439, 443 (9th Cir.1966), aff'g T.C. Memo.1965–84)). Although the subject usually arises when the recipient fails to pay tax on the constructive dividend, the concepts also apply when one shareholder reaps a benefit to the detriment of the others (*see Nazarov v Abramovich*, 85 AD3d 883, 885 [2d Dept 2011]).

Constructive dividends may consist of compensation paid to a shareholder in excess of what is considered reasonable; the use of corporate-owned property if the value of such usage is not repaid or is not included in a shareholder-employee's salary or wages (*Lang Chevrolet Co.*,T.C. Memo. 1967-212; Brock, T.C. Memo. 1982-335); or, the bargain purchases of corporate property by a shareholder (IRS Letter Ruling 200215036). Benefits paid or given to a family member may also constitute constructive dividends (*Snyder*, T.C. Memo. 1983-692).

Thus, the payments made to the parties must be treated as constructive dividends. Accordingly, plaintiffs have received dividends and constructive dividends in the amount of $5,246,001, representing $3,954,121 in payments from GVL; $713,000 directly from defendants; and $578,880, in imputed rent for the apartment held off the market for plaintiffs' use.

Defendants have received dividends and constructive dividends in the amount of $6,689,534, representing $1,959,382 in payments from GVL; $1,693,960 in pension and life insurance premiums; $208,415 in donations made by GVL on defendants' behalf; $434,062 in non-business expenses reimbursed by GVL; $281,176 in lost profits from the below market sale of units to family members; $204,539 in excess commissions to Dahlia; and $1,908,000 in imputed rent for the units used by defendants. Accordingly, the defendants have received distributions and imputed distributions in the amount of $6,689,534.

Thus, plaintiffs have received dividends and constructive dividends in the amount of $5,246,001. Defendants have received dividends and constructive dividends, less a credit for monies paid to plaintiff, in the amount of $6,689,534. Because the defendants Roger Yang, as Administrator of the Estate of Mu-Chiao Yang, Hsiu-Lan Yang, and, A.J. Chan own twice the plaintiffs share, defendants are entitled to an additional dividend of $3,802,486 ($5,246,001 x 2 = $10,492,002 - $6,689,534 = $3,802,486).

Defendants argue that the classification of some of these payments as constructive dividends is barred by the statute of limitations. However, plaintiffs acquiesced to these payments because the parties agreed that they would be made in lieu of dividends to avoid taxes. Accordingly, the classification is not barred by the statute of limitations.

The first cause of action alleges corporate waste. "[t]he essence of a waste claim is 'the diversion of corporate assets for improper or unnecessary purposes.' " (*SantiEsteban v. Crowder*, 92 A.D.3d 544, 546 [1st Dept. 2012]) . Waste occurs when assets were utilized improperly or unnecessarily in breach of fiduciary duty (*see People by Underwood v Trump*, 62 Misc 3d 500, 512 [Sup Ct 2018]). Plaintiffs have proven corporate waste, which is remedied by the reclassification of wasted assets as constructive dividends.

The second cause of action alleges that the individual defendants and Defendants Ju Yi Garden LLC and Dahlia Realty Inc. be jointly and severally held to account for all monies and property looted, wasted, squandered, and misappropriated and all losses and damages sustained by GVL by reason of the acts and conduct described in the complaint. To the extent that this cause of action seeks relief against the individual defendants, it is duplicative of the first cause of action. Furthermore, plaintiffs have failed to prove any wrongdoing by defendants defendants Ju Yi Garden LLC and Dahlia Realty Inc. Accordingly, the Court finds for defendants on this cause of action.

The third cause of action requests that the individual defendants and Defendants Ju Yi Garden LLC and Dahlia Realty Inc. jointly and severally post security in such amount as the court may require to indemnify GVL against any future losses, expenses, and damages arising by reason of the actions set forth in this complaint. The plaintiffs have failed to prove any future losses. Accordingly, the Court finds for defendants on this cause of action.

The fourth cause of action seeks a permanent injunction enjoining defendants from self-dealing. "To establish, prima facie, entitlement to a permanent injunction, a plaintiff must demonstrate: (a) that there was a violation of a right presently occurring, or threatened and imminent; (b) that he or she has no adequate remedy at law; (c) that serious and irreparable harm will result absent the injunction; and (d) that the equities are balanced in his or her favor" (*Intl. Shoppes v At the Airport*, 131 AD3d 926, 938 [2d Dept 2015]). However, the allegations of self-dealing arose from the complete disregard of corporate governance by all parties. Now that percentages of ownership have been determined, the rules of corporate governance provide an adequate remedy at law. Accordingly, plaintiffs have failed to prove their cause of action for a permanent injunction.

The fifth cause of action seeks to impose a constructive trust on the shares of GVL owned by defendants. "To obtain the remedy of a constructive trust, a party is generally required to establish four factors, or elements, by clear and convincing evidence: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment

flowing from the breach of the promise" (*Sanxhaku v Margetis,* 151 AD3d 778, 779 [2d Dept 2017]). In the instant case, plaintiffs have failed to prove that shares were transferred to defendants in reliance of a promise arising from a fiduciary relationship. Accordingly, plaintiffs have failed to prove their cause of action for a constructive trust.

The seventh cause of action seeks an award of reasonable attorneys fees. Section 626 of New York's Business Corporation Law provides the mechanism for bringing a shareholder derivative action. It requires the plaintiff in such an action to be a shareholder at the time the action is brought, and at the time of the transaction implicated in the lawsuit, and it further requires that, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort" (BCL § 626(b), (c)).

BCL Section 626(e) provides that "If the action on behalf of the corporation was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs or a claimant or claimants as the result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorney's fees, and shall direct him or them to account to the corporation for the remainder of the proceeds so received by him or them." As a general rule, a fee award is appropriate if the plaintiff has achieved a substantial benefit for the corporation (See *Seinfeld v. Robinson,* 246 A.D.2d 291 [1st Dep't 1998]) .

In the instant case, there was no board of directors, so the demand does not apply. Furthermore, this action has achieved a substantial benefit to the corporation because the reclassification of free rent, below market sales, pension and life insurance payments, commissions, non-business expenses and donations, into distributions, constitutes the recoupment of monies that would have been wasted. Thus, plaintiffs are entitled to a fee award.

The eighth cause of action, which seeks a preliminary injunction pending the trial, is moot.

The ninth cause of action seeks exemplary damages. "Recovery of exemplary or punitive damages in a common-law action requires a showing of conscious disregard of the rights of others or conduct so reckless as to amount to such disregard" (*see Welch v Mr. Christmas Inc.*, 57 NY2d 143, 150 [1982]). Plaintiffs have failed to prove the conscious disregard of the rights of others or conduct so reckless as to amount to such disregard."

Plaintiffs also move to conform the pleadings to the proof to add a cause of action for an accounting. "In order to enlist the aid of a court of equity in vindicating the right to an accounting, a plaintiff must show a demand for an accounting and a failure or refusal by the partner with the books, records, profits or other assets of the partnership in his possession to account to the other partner or partners" *(Conroy v Cadillac Fairview Shopping Ctr. Properties (Maryland), Inc.*, 143 AD2d 726 [2d Dept 1988]). In the instant case, the discovery in this action

yielded complete disclosure of the books and records of GVL. Accordingly, the plaintiffs' motion is denied.

Plaintiffs also seek to conform the pleadings to the proof to add a cause of action for breach of fiduciary duty. However, allowing this claim would not result in any relief not already awarded pursuant to the first cause of action. Accordingly, the plaintiffs' motion is denied.

Accordingly, it is,

Ordered, that the individual plaintiffs, Chun You Cheng and Chiu MingYang Cheng are one-third owners, defendant AJ Chan is a one-third owner and the defendants Hsiu-Lan Yang and Roger Yang, as Administrator of the Estate of Mu-Chiao Yang are one-third owners of Garden View LTD.; and it is further,

Ordered, that the individual defendants, Roger Yang, as Administrator of the Estate of Mu-Chiao Yang, Hsiu-Lan Yang, and, A.J. Chan, pursuant to their shareholder interests, are entitled to additional dividends to be paid by GVL in the amount of $3,802,486.; and it is further,

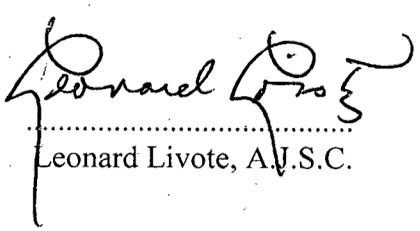
Ordered, that a hearing will be held on October 30, 2019 at 9:30 a.m., at Supreme Court, Queens County, 88-11 Sutphin Boulevard, Jamaica, New York 11435, Courtroom 122 to determine the amount of plaintiffs attorneys fees. The parties are directed to bring all pertinent papers, documents and witnesses to the hearing, including a detailed affirmation of legal services setting forth the legal services performed, the anounts of time expended on that service and the hourly rate charged. Said affirmation must be served on the defendants no later that October 1, 2020. The parties must contact the Clerk, at 718 298-1043, 48 hours in advance to confirm.

Any matters raised at trial and not specifically addressed herein are denied.

This constitutes the Decision of the Court.

Settle Judgment.

Dated: July 9, 2020



Leonard Livote, A.J.S.C.

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