Matter of Quazzo v 9 Charlton St. Corp.
2019 NY Slip Op 30098(U)
January 10, 2019
Supreme Court, New York County
Docket Number: 652282/2010
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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In the Matter of CRISTINA QUAZZO,

Petitioner

- V -

9 CHARLTON STREET CORPORATION, PEARLBUD REALTY CORPORATION, and ORBIS INTERNATIONAL CORPORATION,

and UGO QUAZZO as Officer and Director of 9 CHARLTON STREET CORPORATION, PEARLBUD REALTY CORPORATION, and ORBIS INTERNATIONAL CORPORATION,

And STEPHEN QUAZZO and MARCO QUAZZO as Officers, Directors, and Shareholders of 9 CHARLTON STREET CORPORATION, PEARLBUD REALTY CORPORATION, and ORBIS INTERNATIONAL CORPORATION,

Respondents.

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INDEX NO. 652282/2010

MOTION DATE

MOTION SEQ. NO. 009

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 009) 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 259, 261, 262, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 284, 285, 286, 287, 291, 300, 302, 305

were read on this motion to/for SUMMARY JUDGMENT.

These two matters, both brought by Cristina Quazzo, involve a dispute over control of the family businesses, three closely-held corporations—9 Charlton Street Corporation (Charlton), Pearlbud Realty Corporation (Pearlbud), and Orbis International Corporation (Orbis) (collectively, the corporations). In the special proceeding (Index No. 652282/10), Cristina,[1] as petitioner, moves for summary judgment, pursuant to CPLR 3212, against the corporations, as respondents, and respondent Ugo Quazzo, her father, on her claims for judicial dissolution of the corporations, the appointment of a receiver, and attorney's fees and expenses. In the plenary action (Index No. 652002/11), Cristina, as plaintiff, moves for summary judgment against the corporations and Ugo, as defendants, and defendant Stephen Quazzo, her brother, on the

[1] As many of the parties share the same surname, they will be referred to by their first names, not out of disrespect but in order to avoid confusion.

following causes of action for damages and other relief: the first cause of action, brought by Cristina in her individual capacity against Ugo and Stephen, for breach of fiduciary duty; the third, also brought by Cristina in her individual capacity against Stephen, for aiding and abetting breach of fiduciary duty; the seventh, brought by Cristina in her derivative capacity, against Ugo and Stephen, for breach of fiduciary duty; the tenth, a derivative claim against Stephen, for aiding and abetting breach of fiduciary duty; the twelfth, a derivative claim against Ugo and Stephen, for misappropriation of corporate assets; the thirteenth, a derivative claim against Ugo and Stephen, for conversion of corporate assets; the sixteenth, a derivative claim against Ugo and Stephen, for waste of corporate assets; the seventeenth, a derivative claim for removal of directors pursuant to Business Corporation Law (BCL) § 706; the eighteenth, a derivative claim for removal of officers pursuant to BCL § 716; the twentieth, a derivative claim against Ugo and Stephen, for violations of BCL §§ 719 and 720; and the twenty-second, for attorney's fees and expenses.[2]

Background

Ugo is the father of Cristina, Stephen, and Marco. (Aff. of Ugo Quazzo In Opp. to Petition [Ugo Aff. In Opp.], ¶ 2; Am. Pet., ¶¶ 8-10.) Ugo is the president of each of the corporations and has testified that he has been responsible for managing them. (Amended Joint

[2] Although Cristina served separate notices of motion for summary judgment in the dissolution proceeding and the plenary action, the parties requested consolidated briefing. (See Index No. 652282/2010, NYSCEF Doc. No. 237; Index No. 652002/2011, NYSCEF Doc. No. 108.) All references to the papers in connection with these motions are to the papers filed in the dissolution proceeding. With the exception of the notices of motion, the papers filed in the dissolution proceeding and the plenary action are virtually identical.

The plenary action was discontinued against defendant Marco Quazzo by stipulation dated June 25, 2013 (NYSCEF Doc. No. 71), and was discontinued against defendants Silvia Pizzetti, Dinah Heller, and Walter Gabutti by stipulation dated January 13, 2014 (NYSCEF Doc. No. 83).

In the plenary action, Cristina does not move for summary judgment on the following causes of action: The second and eighth causes of action, individual and derivative claims, respectively, against Ugo and Stephen, for conspiracy to breach fiduciary duty; the fourteenth, a derivative claim against Stephen, for aiding and abetting conversion of corporate assets; the nineteenth, a derivative claim against Ugo and Stephen, for violations of BCL § 719; and the twenty-first, a derivative claim against Ugo and Stephen, for an accounting.

Statement of Undisputed Material Facts [Am. Jt. St.], ¶ 16.) Charlton and Pearlbud own and manage rental property in New York. (Ugo Aff. In Opp., ¶¶ 4-5; Compl., ¶ 57.) Orbis is involved in a business that is described variously as servicing espresso machines in New York (Ugo Aff. In Opp., ¶ 3) and importing and selling "various products." (Am. Pet., ¶ 38.)

The parties dispute whether Cristina is a shareholder of the corporations and a director of Charlton and Pearlbud. (Cristina Memo. In Supp., at 15; Ugo Memo. In Opp., at 12[3]; Stephen Memo. In Opp., at 1.) Cristina asserts that prior to 2001, Ugo made gifts of one-third of the shares of each of the three corporations to her, Marco, and Stephen, and that she continues to be the record and beneficial shareholder of one-third of the outstanding shares of each of the corporations. (Cristina Aff., ¶ 5.) Cristina contends that "[a]s a one-third (1/3) shareholder of each of the Corporations, [she] has standing to bring a dissolution proceeding, seek the additional equitable relief sought in the Special Proceeding, and bring the individual and derivative claims set forth in the Action." (Cristina Memo. In Supp., at 3.)

In response, Ugo claims that he was advised, "as a substitute for estate planning," to prepare shares for the corporations in the names of his children. (Ugo Aff. In Opp., ¶ 6.) He contends that he "did not intend to transfer any present interest in the Corporations at the time the shares were prepared," and that "[i]t has always been [his] understanding that [he is] the sole owner of the Corporations and that the shares, if not voided, would only pass upon [his] death." (Id., ¶ 8.) He further asserts that he has "always exercised complete control" over the corporations. (Id., ¶ 9.)

Relying on a decision of this court denying Ugo's and the corporations' prior motion for summary judgment in the dissolution proceeding, Stephen claims that this court has already

[3] Ugo Memo. In Opp. refers to the memorandum of law filed on behalf of Ugo and the corporations in opposition to Cristina's summary judgment motion.

found that there is a triable issue of fact as to whether Cristina has an ownership interest in shares of the corporations. (Stephen Memo. In Opp., at 9, citing Quazzo v 9 Charlton St. Corp., 2014 NY Slip Op 30625 [U], 2014 NY Misc Lexis 1093, 2014 WL 978322 [Sup Ct, NY County 2014] [the 2014 Decision or Prior Decision].) Stephen acknowledges that he saw Cristina's signature on K-1 Schedules for Charlton, which he also received, but claims that he does not know if she was a shareholder of Pearlbud and Orbis. (Stephen Memo. In Opp., at 9.) In addition, Stephen cites Ugo's testimony that Ugo cancelled shares in the corporations in 2003. (Id.) In sum, Stephen claims that there are triable issues of fact as to Cristina's status as a shareholder. (Id., at 9-11.)

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b])." (Zuckerman, 49 NY2d at 562.)

Standing

As a threshold matter, the court rejects Stephen's contention that this court's 2014 Decision is conclusive as to whether a triable issue of fact exists as to Cristina's status as a shareholder of the corporations. In the 2014 Decision, the court held that Cristina produced documentary evidence, in opposition to Ugo's summary judgment motion, "which raise[d] a

triable issue of fact as to her ownership of shares of the corporations." (Quazzo, 2014 NY Misc Lexis 1093, * 4.) On that motion, however, Cristina did not ask the court to search the record. The 2014 Decision therefore does not preclude her claim, on the record developed on this motion, that she is entitled to summary judgment on her shareholder status.

The court now holds that Cristina makes a prima facie showing that she has a one-third ownership interest in Charlton. In support of this claim, Cristina submits extensive documentary evidence, including the following: Charlton share certificates issued to Cristina, dated August 29, 1990, September 28, 1993, and August 8, 2003 (Cristina Aff., Exh. L); a Written Consent Of Shareholders To Action Without A Meeting, for Charlton, signed by Cristina, Marco, and Stephen as shareholders, dated May 2001 (Cristina Aff., Exh. P at UQ 01290); one of Ugo's internal documents regarding the corporations, dated July 7, 2003, which states as to Charlton: "Stocks in name of 3 children . . . ." (Cristina Aff., Exh. R at UQ 01899); a Certificate Of Amendment for Charlton, listing Marco as secretary, treasurer, and shareholder, Stephen as vice president and shareholder, and Cristina as shareholder, dated July 29, 2003 (Cristina Aff., Exh. S); an Election by a Federal S Corporation To be Treated as a New York S Corporation, signed by Cristina as a shareholder (Cristina Aff., Exh. V); Charlton K-1 Schedules, issued to Cristina as a shareholder, for each year from 1996 through 2012 (Cristina Aff., Exh. W); a memorandum, dated September 4, 2003, from Ugo to Cristina, in which Ugo states: "Your 1/3 non voting shares of 9 Charlton St Corp. stay" (Cristina Aff., Exh. U at UQ 02076); a document attached to a letter, dated February 18, 2010, sent by Ugo to Ralph Pastore, the corporations' accountant, which states for Charlton: "OWNERSHIP: 1/3h Stephen, Marco, Cristina." (Cristina Aff., Exh. Z at PAS 000839); a "Waiver Of Notice Of The Annual Meeting Of Stockholders" for Charlton, identifying Cristina, Marco, and Stephen as shareholders, dated May 24, 2010 (Cristina Aff.,

Exh. AA); minutes of a Charlton annual meeting of shareholders, identifying Cristina, Marco, and Stephen as shareholders and signed by Ugo as president, dated June 1, 2010 (Cristina Aff., Exh. BB); an email from Ugo to Cristina, dated September 24, 2010, stating that Ugo would "consider the possibility of giving you [Cristina] now, in cash, 1/3 of the present market value of the building located at 9 Charlton Street" (Cristina Aff., Exh. CC); Spreadsheet listing Cristina as the owner of 40 shares in Charlton, dated July 7, 2003 and Apr. 4, 2004. (Cristina Aff., Exh. DD).

Although Ugo and Stephen are in control of the corporations' book and records, they fail, in response to Cristina's compelling showing, to submit documentary or other evidence sufficient to raise a triable issue of fact as to Cristina's shareholder interest in Charlton. As noted in the 2014 Decision, Ugo and Stephen produced the majority of these documents and they do not contest their authenticity. Nor do Ugo and Stephen offer any explanation for the numerous corporate documents identifying Cristina as a shareholder of Charlton and specifying acts she took in that capacity. (See Quazzo, 2014 NY Misc Lexis 1093, * 5-6.)[4]

Moreover, in the face of Cristina's documentary evidence, Ugo's conclusory assertions of lack of donative intent do not create a question of fact. (See Pell St. Nineteen Corp. v Yue Er Liu Mah, 243 AD2d 121, 125 [1st Dept 1998], lv dismissed 92 NY2d 947 [1998], lv denied 93 NY2d 808 [1999].) Ugo's contention that the failure to deliver the shares to Cristina demonstrates as a matter of law that no inter vivos gift was effectuated is also unpersuasive. For

[4] Ugo claims, as he did on his prior motion for summary judgment, that the annual provision of K-1 Schedules to Cristina for Charlton was the result of a mistake by his accountant Ralph Pastore. (Ugo Memo. In Opp., at 14.) As previously held, this excuse strains credulity, given that this "mistake" persisted for the 16 year period from 1996 through 2012. (See Quazzo, 2014 NY Misc Lexis 1093, * 6). Moreover, Mr. Pastore testified that Ugo informed him that his three children were shareholders of 9 Charlton. (Deposition of Ralph Pastore, dated Jan. 6, 2014, at 83-85 [Jt. Appendix, Exh. K].)

the reasons stated and on the authorities cited in the Prior Decision, physical possession of the shares is not dispositive. (Quazzo, 2014 NY Misc Lexis, at * 7-8.)

The court also rejects Stephen's argument that an email from Cristina to Ugo, dated May 26, 2008, raises an issue of fact as to whether she is a shareholder of Charlton. (Stephen Memo. In Opp., at 10.) The email, which discussed Cristina's request for money from Ugo, suggested sources of funds, including the following: "2) or I could receive loan money for that amount. (ie a mortgage from one of the buildings as I am not a shareholder or owner of them now. . ." (Deposition of Cristina Quazzo, Exh. 19 at UQ 02041 [Jt. Appendix, Exh. F].) According to Cristina, the last line contains a typographical error, and what she meant to say was that a mortgage on the buildings could be offered for a loan as she was "now a shareholder or owner of them now. . . ." (Cristina Aff. In Supp., ¶ 49.) As held in the Prior Decision, this email is ambiguous. (Quazzo, 2014 NY Misc Lexis 1093, * 9.) In light of Cristina's compelling documentary evidence showing her ownership interest in Charlton, however, this email is insufficient to create an issue of fact.

The court accordingly holds that Cristina has standing to maintain her dissolution claim with respect to Charlton.[5]

[5] This holding should not be construed as a grant of the branch of Cristina's summary judgment motion on her cause of action for a declaratory judgment that she is a shareholder of Charlton (and the other corporations). Cristina seeks the declaration in the motion for summary judgment in the dissolution proceeding. In her original petition, dated December 16, 2010, she pleaded a cause of action for a declaratory judgment. She did not, however, plead this cause of action in her amended petition, dated August 15, 2011. Although Cristina pleaded causes of action for a declaratory judgment in the plenary action, this court (Fried, J.) dismissed these causes of action as duplicative of those in the dissolution proceeding. (Quazzo v 9 Charlton St. Corp., 2012 NY Slip Op 33366 [U], 2012 NY Misc Lexis 6333, * 7-8 [Sup Ct, NY County 2012].) It appears that the causes of action were not in fact duplicative, given the omission of the declaratory judgment cause of action in the amended petition. In any event, issuance of a declaratory judgment is not proper, as the causes of action in the dissolution proceeding and plenary action require a determination of Cristina's status as a shareholder of Charlton (and the other corporations) and therefore afford her an adequate remedy. (See generally Artech Info. Sys., L.L.C. v Tee, 280 AD2d 117, 125 [1st Dept 2001]; accord Singer Asset Fin. Co., LLC v Melvin, 33 AD3d 355, 358 [1st Dept 2006]; Wells Fargo Bank, N.A. v GSRE II, Ltd., 92 AD3d 535, 536 [1st Dept 2012].)

The court reaches a different result as to Cristina's assertion that she is entitled to summary judgment on her claim that she is also a shareholder of Pearlbud and Orbis. As in the case of Charlton, she produces stock certificates evidencing that she was issued shares in the corporations—a Pearlbud certificate from 1976 and an Orbis certificate from 2001. She also produces evidence of recognition of her ownership interest in Orbis through March 2001 and in Pearlbud through July 2003. (Cristina Aff. In Supp., Exhs. P [Written Consent Of Shareholders To Action Without A Meeting for Pearlbud, listing Cristina as a shareholder, dated May 2001]; Q [Written Consent Of Shareholders To Action Without A Meeting for Orbis, listing Cristina as a shareholder, dated ___ 2001]; T [Certificate Of Amendment Of Certificate Of Incorporation for Pearlbud, listing Cristina as a shareholder, filed July 31, 2003].)

In opposition, as discussed above, Ugo asserts that it was never his intention that the shares pass until his death. He also submits evidence, dating to September 2003, as of which time there was a breakdown in his relationship with Cristina, in which he advised Cristina that he would afford her an ownership interest in Charlton and other assets, which did not include Pearlbud and Orbis. (Ugo Aff. In Opp., Exh. A at UQ 02076 [Sept 4, 2003 Memo from Ugo to Cristina, stating: "Your 1/3 non voting shares of 9 Charlton St. Corp. stay"]; Cristina Aff. In Supp., Exhs. Z at PAS 000821, 000839 [Feb. 18, 2010 Letter from Ugo to Pastore, the corporations' accountant, attaching the following information about ownership of the corporations: Charlton—"OWNERSHIP: 1/3h Stephen, Marco, Cristina"; Pearlbud: "OWNERSHIP: Stephen and Marco with equal shares, for the ultimate benefit of my 6 Grandchildren"; Orbis: "All shares in the name of Stephen," to be sold at nominal value to workers]; DD [Spreadsheet, dated July 7, 2003, showing the same Allocation of Shares in the corporations].)

In response, Cristina does not come forward with any—let alone, compelling—documentary evidence, like that she produced for Charlton, establishing her ownership interest in Pearlbud and Orbis. The court accordingly holds that issues of fact exist as to Ugo's donative intent with respect to these corporations, notwithstanding the issuance of the stock certificates. (See Pell St. Nineteen Corp., 243 AD2d at 125; Quazzo, 2014 NY Misc Lexis 1093, * 6-8.) As the court does not find that Cristina has established an ownership interest in and therefore standing to maintain claims as to Pearlbud and Orbis, the court will address the merits of Cristina's causes of action only as to Charlton.

Claims in the Special Proceeding as Related to Charlton

Dissolution

Cristina claims that she is entitled to judicial dissolution of the corporations under both Business Corporation Law (BCL) § 1104-a and the common law, based on oppression and looting. Cristina's claim of oppression, pursuant to BCL § 1104-a (a) (1), is based on respondents' failure to recognize her as a shareholder, the alleged forgery of her signature, denial to her of access to the corporation's books and records, failure to pay her a dividend, and alleged financial mismanagement of the corporation. (Cristina Memo. In. Supp., at 12-13.) She further contends that there is evidence of "corporate looting, diversion of corporate assets, and waste," within the meaning of BCL § 1104-a (a) (2), based on alleged failure to pay rents of nearly $2 million into corporate accounts, transfer of $800,000 to third-party accounts with no alleged connection to the corporations, and failure to pay more than $2 million in taxes. (Id., at 14, citing Aff. of James J. Donohue [Cristina's forensic accountant], dated Aug. 26, 2015 [Donohue Aff.].)

Ugo counters that the wrongs on which Cristina bases her dissolution claims do not constitute oppression as a matter of law. (Ugo Memo. In Opp., at 20.) He also claims that she made no investment in the corporations, had no reasonable expectation of a return on investment, and received payments from Ugo out of "generosity." (Id., at 21, 23.) He denies any financial mismanagement and contends that her claims are barred by unclean hands, as she allegedly knowingly received payments that she now claims are wrongful. (Id., at 21-22.) Stephen takes no position on whether the companies should be dissolved. (Stephen's Memo. In Opp., at 11, n 2.)

Business Corporation Law § 1104-a (a) provides in pertinent part:

> "The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds: (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation."

Cristina fails on this record to demonstrate oppression as a matter of law. Oppressive actions have been defined "to refer to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise. . . . A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise." (Matter of Kemp & Beatley, Inc., 64 NY2d 63, 72-73 [1984].) There is authority that where a party has contributed capital or services to a corporation, oppression may be based on the very denial of a party's shareholder status. (See Quazzo, 2014 NY Misc Lexis 1093, * 11-12 [citing cases].) Here, in contrast, it is undisputed that Cristina did

not commit capital to Charlton (or the other corporations), and did not have an active role in Charlton (or the other corporations). Cristina does not submit legal authority, and the court does not find, that under these circumstances, Ugo's denial of her status as a shareholder of Charlton rises to the level of oppression warranting dissolution of the corporation.

Nor does Cristina otherwise establish oppression on this record. As to her claim that she has been denied access to books and records of Charlton, it is undisputed that she did not demand such access until November 2010, after she requested a distribution from a family trust account and she rejected Ugo's demand that she sign a general release as a condition of the distribution. (Am. Jt. St., ¶¶ 9, 10; Cristina Aff. In Supp., ¶ 10; Compl., ¶¶ 22-23, Exh. P.)

Cristina also fails to demonstrate oppression based on denial to her of distributions for Charlton. It is undisputed that Stephen and Marco each received a distribution from Charlton for 2010 of approximately $6,800. There is no evidence, however, that any other distributions—let alone, substantial distributions—were made over the many years in which Cristina claims she has had an ownership interest in Charlton.

To the extent that Cristina bases her oppression claim on forgery of her signature on corporate documents, she relies on the affidavit of Khody Detwiler, a forensic document examiner, opining that Cristina's signature was forged on four corporate documents in 2003. Ugo and Stephen both deny any knowledge of, or involvement in, the alleged forgeries. (Ugo Aff. In Opp., ¶13; Stephen Aff. In Opp., ¶ 34.) Although their denials are conclusory, assessment of the expert's opinion requires a credibility determination, which is not properly made on a motion for summary judgment.

Finally, Cristina's claim of financial mismanagement is based on the affidavit of James Donohue, Cristina's forensic accountant, opining that rents have not been paid into the

corporation's accounts, funds have been transferred to third-party accounts (of Walter Gabutti and Fiorella Carli), and taxes have not been paid. (Donohue Aff., ¶ 9.) Ugo opposes this claim, stating in conclusory fashion: "Insofar as I am concerned, nothing inappropriate has taken place." (Ugo Aff. In Opp., ¶ 13.) Stephen denies ever having had any involvement in the management of Charlton or the other corporations, and states that Ugo alone managed the corporations. (Stephen Aff. In Opp., ¶ 19.) He further claims that, after he learned of Cristina's allegations in these lawsuits, he urged his father to hire an independent third-party property management firm. (Id., ¶ 29.) Citing Cristina's allegations of mismanagement, Stephen asserts that "[t]he only evidence of asset misuse, if any, points to Ugo." (Stephen Memo. In Opp., at 16.) Neither Ugo nor Stephen submits evidence responding to the claims of Cristina's forensic accountant. Nevertheless, Mr. Donohue forthrightly acknowledges that certain records regarding rents and deposits were unavailable to him, and that he made estimates or relied on evidence not in the record, in calculating the discrepancy between rents and tax returns and between loans to the corporations from third parties and transfers from the corporate accounts to third party accounts. (Donohue Aff., e.g. ¶¶ 40-47, 54-60.) The court accordingly holds that Mr. Donohue's opinion cannot be adequately assessed on this record and that a triable issue of fact exists as to the alleged mismanagement.

The court further holds that Ugo raises a triable issue of fact as to whether Cristina's dissolution claim is barred under the doctrine of unclean hands based on her alleged knowing receipt of funds diverted from Charlton or the other corporations. (See generally Savitt v Greenberg Traurig, LLP, 126 AD3d 506, 507 [1st Dept 2015].) Ugo submits evidence that Cristina received a number of wire transfers in 1998 and 1999 from the third-party accounts of Gabutti and Carli, who were the alleged recipients of wrongful transfers from the corporations.

(Ugo Aff. In Opp., Exhs. B-G.) Cristina claims in this proceeding that the Gabutti and Carli accounts are "sham bank accounts" used by Ugo to divert money from the corporations. (Cristina Aff. In Supp., ¶ 37.) She does not deny that she received money from these accounts, but asserts that she "never knew whether or not any money [s]he received from [her] father came from the Corporations." (Id., ¶ 8; Cristina Reply Memo., at 9.) Resolution of this issue requires a credibility determination which must be made at trial. As discussed above, there is also an unresolved issue of fact as to whether, or to what extent, the funds from the third-party accounts were diverted from Charlton (or the other corporations).[6]

Finally, for the reasons stated on Ugo's prior motion for summary judgment, the court rejects his argument that the dissolution claim is barred by the statute of limitations. It is unclear whether Ugo raises the statute of limitations as to the dissolution claim only as to Pearlbud and Orbis or also as to Charlton. (Ugo Memo. In Opp., at 16-18.) In either event, Ugo fails to demonstrate as a matter of law that he is not estopped from asserting the defense or that there are not timely claims. Ugo also fails to offer any evidence of prejudice in support of his contention on this motion that the dissolution claim is barred by laches. (See generally Matter of Linker, 23 AD3d 186, 189 [1st Dept 2005]; see also Matter of Bayside Controls, Inc., 295 AD2d 343, 345 [2d Dept 2002].)

Appointment of a Receiver

Cristina seeks the appointment of a receiver based on the alleged oppression and financial mismanagement on which she relies in support of her claim for dissolution. (Cristina Memo. In.

[6] Contrary to Cristina's apparent contention (see Cristina Memo. In Supp., at 14), this court's holding in the 2014 Decision that Cristina stated a viable claim for dissolution does not bar consideration at trial of Ugo's unclean hands defense. That holding was made in the context of this court's denial of Ugo's motion for summary judgment. (Quazzo, 2014 NY Misc Lexis 1093, * 13.) As noted above, Cristina did not request on that motion that the court search the record and determine her claims on the merits.

Supp., at 15-16.) Ugo opposes, and Stephen takes no position on, whether a receiver should be appointed. (Ugo Memo. In Opp., at 23-24; Stephen Memo. In Opp., at 11, n 2.)

BCL § 1202 (a) (1) authorizes a court to appoint a receiver of the property of a corporation in a special proceeding brought under Article 11 for judicial dissolution. A court also has authority to appoint a receiver under BCL § 1113, which provides that "[a]t any stage of an action or special proceeding under this article, the court may, in its discretion, make all such orders as it may deem proper in connection with preserving the property and carrying on the business of the corporation, including the appointment and removal of a receiver under article 12 (Receivership), who may be a director, officer or shareholder of the corporation."

Here, however, Cristina does not demonstrate as a matter of law that she has been oppressed or that financial mismanagement has occurred. Nor does she demonstrate that the corporation is in danger of irreparable loss or injury. The drastic remedy of a appointment of a receiver is therefore not warranted on this record.

Attorney's Fees

Cristina's request for attorney's fees in connection with the dissolution proceeding is denied as premature.

Declaratory Judgment

Cristina seeks a declaratory judgment in the dissolution proceeding that she is a shareholder of Charlton. (Cristina Memo. In Supp., at 15.) This branch of the motion is denied for the reasons discussed above. (See supra, at n 5.) She also seeks a declaratory judgment that she is a director of Charlton and Pearlbud. (Cristina Memo. In Supp., at 15.) As also previously noted (supra, at n 5), Cristina does not plead a cause of action in the dissolution proceeding for a declaratory judgment as to her status as a director. Although she pleaded a cause of action for

this relief in the plenary action, it was dismissed as duplicative by prior order of this court (Fried, J.). (Quazzo, 2012 NY Misc Lexis 6333, * 7-8.) Even if the claim is considered, the documentary evidence in support consists solely of Written Consents Of Shareholders To Action Without A Meeting—one for Charlton and one for Pearlbud, both dated May 2001, stating that Cristina was elected as a director of Charlton and of Pearlbud, respectively, at that time. (Cristina Aff., Exh. P.) Cristina submits no evidence that she is currently a director. Moreover, the record contains evidence to the contrary. (Id., Exh. DD [Spreadsheets, dated July 7, 2003 and Apr. 4, 2004, showing the directors for Charlton and Pearlbud as Ugo, Stephen and a third-party (JL)].) Triable issues of fact thus require denial of this claim.

Cristina's Claims in the Plenary Action as Related to Charlton

In the plenary action, Cristina moves for summary judgment on the first and third causes of action, brought by her individually, against Stephen and Ugo for breach of fiduciary duty, and against Stephen for aiding and abetting such breach. These causes of action are based on the allegations that defendants have denied Cristina access to corporate books and records, failed to make distributions to her, forged her signature on corporate documents, denied her status as a shareholder and, in Stephen's case, failed to keep himself informed of corporate activities and to object to Ugo's improper activities. (See Compl., ¶¶ 74-75, 97-98.) These allegations were also asserted by Cristina in support of her dissolution claim based on oppression. For the reasons stated above, triable issues of fact exist as to these allegations. In addition, although it is not disputed that officers and directors in closely held family corporations have fiduciary obligations to minority shareholders (see Castellotti v Free, 138 AD3d 198, 209 [1st Dept 2016]), the parties have not adequately addressed the scope of such obligations. Summary judgment on the first and third causes of action will accordingly be denied.

Cristina also moves for summary judgment on the following derivative causes of action: The seventh and tenth (breach of fiduciary duty and aiding and abetting such breach), the twelfth (misappropriation), thirteenth (conversion), and sixteenth (waste). These causes of action are all based on allegations of financial management—i.e., misappropriation or conversion of corporate assets—and, in some instances, allegations of oppression, which, as discussed above, were also the basis of the dissolution claim. (See Compl., ¶¶ 127, 160, 178, 185-186, 218.) As held above, triable issues of fact exist as to these allegations.

In addition, even assuming that Cristina is a shareholder or director, Ugo challenges Cristina's standing to maintain derivative claims based on her "two decade long indifference toward, and willful ignorance about the Corporations. . . ." (Ugo Memo. In Opp., at 24.) On the briefing of this motion, the parties have not adequately addressed the legal standards for maintenance of derivative claims in the context of closely held family corporations.

Cristina also seeks summary judgment on the derivative seventeenth and eighteenth causes of action for removal of Ugo and Stephen (and others) as directors and officers. These causes of action allege breach of fiduciary duty based on the wrongful conduct alleged in the above causes of action. Cristina also seeks summary judgment on the derivative twentieth cause of action for violation of Business Corporation Law §§ 719 and 720, based on the same allegations of waste, conversion, and misappropriation that underlie the above causes of action. (Compl., ¶ 241-247.) Triable issues of fact thus also preclude summary judgment on these causes of action. Summary judgment on the twenty-second cause of action for attorney's fees will also be denied as premature.

It is accordingly hereby ORDERED that the motion of plaintiff Cristina Quazzo for summary judgment in the dissolution proceeding (Index No. 652282/10) is denied in its entirety; and it is further

ORDERED that the motion of plaintiff Cristina Quazzo in the plenary action (Index No. 652002/11) is denied in its entirety.

This constitutes the decision and order of the court.

1/10/2019
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE