SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

JONATHAN TROFFA,	:	Index No. 609510/2016
Petitioner/Plaintiff,	:	Hon. Jerry Garguilo
JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,	:	
Plaintiff,	:	
-against-	:	
JOSEPH M. TROFFA,	:	
Respondent/Defendant,	:	
LAURA J. TROFFA, JOS. M. TROFFA MATERIALS CORPORATION, NIMT ENTERPRISES, LLC, L.J.T. DEVELOPMENT ENTERPRISES, INC., and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,	:	
Defendants.	:	

RESPONDENT/DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ALL NON-DISSOLUTION CLAIMS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Respondent/Defendants Joseph M. Troffa ("Joseph"), Laura J. Troffa ("Laura"), Jos. M. Troffa Materials Corporation, NIMT Enterprises, LLC ("NIMT"), L.J.T. Development Enterprises, Inc. ("L.J.T.") and Jos. M. Troffa Landscape and Mason Supply, Inc. (together, "Defendants"), by their attorneys, Farrell Fritz, P.C., respectfully submit this Memorandum of Law in support of their motion for an Order, pursuant to CPLR 3211 (a) (1), (3), (5) and (7): (i) dismissing all non-dissolution claims in the Verified Petition/Complaint of Petitioner/Plaintiffs Jonathan Troffa ("Jonathan") and Jos. M. Troffa Landscape and Mason Supply, Inc. (the "Corporation") sworn to June 22, 2016 (the "Petition/Complaint"), and, if and only if the Court deems it properly filed, dismissing the Verified Amended Complaint sworn to August 16, 2016 (the "Amended Complaint"); and (ii) awarding such other and further relief as the Court deems just and proper.

PRELIMINARY STATEMENT

Aside from dissolution,[1] the Petition/Complaint's primary objective is to recover damages for a half-dozen real property transactions that Jonathan admits occurred as long ago as 1980, when he was still in diapers and certainly not a shareholder. The secondary objective is judgment requiring the conveyance of the same parcels to the Corporation. For the following reasons, all of these non-dissolution claims are barred as a matter of law:

[1] The First Cause of Action in the Petition/Complaint, seeking judicial dissolution under BCL § 1104 based on irreconcilable dissension between the two 50% owners, is the subject of Joseph's separate motion seeking dissolution on consent. As explained in that motion, Jonathan violated BCL § 1116 by attempting to discontinue his dissolution claim without Court approval. For that reason, the Court should strike the Amended Complaint. Because the Amended Complaint should be deemed a nullity, this motion is directed at the sufficiency of the Petition/Complaint. However, if and only if the Court is disinclined to strike the Amended Complaint, then this motion is directed, in the alternative, at the sufficiency of the Amended Complaint which contains essentially the identical non-dissolution claims contained in the original Petition/Complaint, plus a new claim, cast in the alternative, reasserting those claims as a shareholder derivative claim rather than as a direct claim by the Corporation.

First, the Court should dismiss the Second Cause of Action in the Petition/Complaint seeking damages for breach of fiduciary duty for all transactions more than three years prior to the filing of this action on June 27, 2016. The statute of limitations for breach of fiduciary duty seeking money damages is three years running from the date of the breach. Under the applicable three-year statute of limitations, all six real property transactions for which Jonathan seeks damages are time barred (*see* Point I).

Second, the Court should dismiss the Third Cause of Action for constructive trust. The Petition/Complaint fails to allege that Jonathan or the Corporation made a transfer in reliance on a promise made to them, an essential element of the claim (*see* Point II.A). In addition, Jonathan cannot show reasonable reliance because he knew, or should have known, the true nature of the transactions, all of which were discoverable with the exercise of ordinary diligence (*see* Point II.B).

Third, if the Court does not dismiss the Third Cause of Action for failure to state a claim, it should partially dismiss it as time barred. The statute of limitations for constructive trust is six years running from the date of wrongful acquisition of property. By this measure, five of the six alleged real property transactions are time barred (*see* Point III).

Fourth, the Court should dismiss the Fourth Cause of Action to quiet title to the so-called "Compost Yard." A duly-recorded deed demonstrates that Joseph is the sole title owner of the Compost Yard. There is no writing to the contrary. Jonathan's claim that the Corporation has a direct, fee simple ownership interest in the Compost Yard is barred by the statute of frauds (*see* Point IV).

Fifth, the Court should dismiss the Second, Third and Fourth Causes of Action in the Petition/Complaint for lack of standing. Each of these claims purportedly is brought in the name

and right of the Corporation – which is named in the caption of the Petition/Complaint as both plaintiff and defendant – seeking relief for the Corporation against Joseph Troffa as its Chief Executive Officer, sole Director, and 50% owner. But Jonathan has no authority whatsoever to bring an action in the Corporation's name and right against another 50% shareholder (*see* Point V).

Sixth, if and only if the Court deems the Amended Complaint properly filed, it should dismiss the First, Second, and Third Causes of Action, which clone the Petition/Complaint's Second, Third, and Fourth Causes of Action, for the same reasons discussed above, and should also dismiss the Amended Complaint's new Fourth Cause of Action in which Jonathan simply seeks to recast the prior causes of action as a shareholder derivative claim. The new Fourth Cause of Action also is time-barred insofar as it asserts claims that pre-date his becoming a shareholder in 1995 (*see* Point VI).

STATEMENT OF THE FACTS

Jos. M. Troffa Landscape and Mason Supply, Inc. (the "Corporation") is a landscape and mason supply business founded by Joseph in 1975, presently consisting of three main segments, bulk materials, ready-mix and hard goods (Affidavit of Joseph M. Troffa, sworn to September 16, 2016 ["Troffa Aff."], Ex. A, ¶ 16). Joseph and his son, Jonathan, are equal 50% shareholders of the Corporation (*id.*, ¶¶ 20-21). Joseph was sole shareholder until December 28, 1995, when he gifted Jonathan 40 shares of stock (*id.*, ¶ 19).

The Corporation conducts its business on six adjacent parcels of real property that it leases in an industrial park in East Setauket, New York (*id.*, ¶ 26). The Corporation never held and does not presently hold title to any of the parcels (*id.*, ¶ 27). Five of the properties, referred to in the Petition/Complaint as the "Laura Properties," are owned by defendants NIMT and

L.J.T. (*id.*). Jonathan is a part owner of NIMT (Troffa Aff., Ex. B., ¶ 11, at 3). The sixth property is owned by Joseph personally (Troffa Aff., Ex. A., ¶ 41). The dates on which NIMT, L.J.T. and Joseph acquired the six properties are as follows:

- On January 15, 1980, Joseph acquired "Parcel #1" a/k/a "Main Yard" (Troffa Aff., ¶ 9 and Ex. F; *compare* Ex. B, ¶ 11).
- On October 7, 1992, L.J.T. acquired "Parcel #2" (Troffa Aff., ¶ 10 and Ex. G; *compare* Ex. B, ¶ 11).
- On March 31, 1997, NIMT acquired "Parcel #1" a/k/a the "Main Yard" from Joseph (Troffa Aff., ¶ 11 and Ex. H; *compare* Ex. B, ¶ 11).
- On June 27, 1997 and March 10, 1998, L.J.T. and NIMT, respectively, acquired "Parcels #3 and #4" a/k/a the "Brick Yard" (Troffa Aff., ¶¶ 12-13 and Exs. I and J; *compare* Ex. B, ¶ 11).
- On February 12, 2004, NIMT acquired "Parcel #5" (Troffa Aff., ¶ 14 and Ex. K; *compare* Ex. B, ¶ 11).
- On March 12, 2013, Joseph acquired "Parcel #6" a/k/a the "Compost Yard" (Troffa Aff., ¶ 15 and Ex. L; *compare* Ex. B, ¶ 11).

On June 27, 2016, Jonathan commenced this action by filing the Petition/Complaint (Troffa Aff., Ex. A). The Petition/Complaint alleges four claims: 1) dissolution under BCL § 1104; 2) breach of fiduciary duty; 3) constructive trust; and 4) quiet title (*id.*, ¶¶ 76-105).

The Petition/Complaint's central thrust is that the six parcels "were each acquired for the benefit of the Corporation and that the Corporation was to be the beneficial owner of said properties, but that the deeds would be titled in the names of the entities which would hold the properties and title for the Corporation" (Troffa Aff., Ex. A, ¶ 28). The relief sought by the

Petition/Complaint includes a demand for "conveyance of the aforementioned properties to the Corporation . . ." (id., ¶ 98).

On August 16, 2016, Joseph filed a Verified Consent to Dissolution and Partial Answer to Petition/Complaint, consenting to dissolution under BCL § 1104 (Troffa Aff., Ex. C). In response, later that same day, Jonathan purported to discontinue the dissolution proceeding by filing an unauthorized Amended Complaint that omitted the original Petition/Complaint's First Cause of Action for judicial dissolution; renumbered the original Petition/Complaint's Second through Fourth Causes of Action as the First through Third Causes of Action, and added a new Fourth Cause of Action which simply incorporates by reference the preceding claims and attempts to plead them as a shareholder derivative claim in the event the Court determines they cannot be brought directly by the Corporation (Troffa Aff., Ex. D).

On August 16, 2016, Joseph filed a Notice of Rejection of the Amended Complaint (Troffa Aff., Ex. E). Jonathan's attempted discontinuance of his claim for dissolution without Court approval is the subject of a separate motion to grant dissolution on consent and to strike the Amended Complaint.

Argument

Point I

THE STATUTE OF LIMITATIONS BARS THE SECOND CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

Under CPLR 3211 (a) (5), the Court may dismiss a complaint as barred by the statute of limitations. "To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired"

(*Stewart v GDC Tower at Greystone*, 138 AD3d 729, 729 [2d Dept 2016]). "Then the burden shift[s] to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period" (*id*. at 729-30).

Under CPLR 3211 (a) (1), the Court may dismiss a complaint where "a defense is founded upon documentary evidence." The Court may grant a motion under CPLR 3211 (a) (1) "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Denenberg v Schaeffer*, 137 AD3d 1197, 1198 [2d Dept 2016] [internal quotations omitted]). "Materials that clearly qualify as 'documentary evidence' include documents reflecting out-of-court transactions such as . . . deeds" (*Sands Point Partners Private Client Group v Fid. Nat. Tit. Ins. Co.*, 99 AD3d 982, 984 [2d Dept 2012] [internal quotations omitted]; *see 11 King Ctr. Corp. v City of Middletown*, 115 AD3d 785, 786 [2d Dept 2014] [holding that "documentary evidence conclusively established, as a matter of law, that the plaintiff corporation was not the owner of record of the subject property"]).

Pursuant to CPLR 3211 (a) (1) and (5), the Court should dismiss as time barred the Second Cause of Action in the Petition/Complaint for breach of fiduciary duty as to all alleged breaches that occurred outside the limitations period (Troffa Aff., Ex. A, ¶¶ 85-94). The documentary evidence conclusively establishes that the statute of limitations bars Jonathan's claim for breach of fiduciary duty based on any transactions or occurrences before June 27, 2013, three years before Jonathan filed the Petition/Complaint.

Under New York law, the statute of limitations for breach of fiduciary duty seeking monetary relief is three years running from the date of the breach (*Elmakies v Sunshine*, 113 AD3d 814, 815 [2d Dept 2014]; *Weiss v TD Waterhouse*, 45 AD3d 763, 764 [2d Dept 2007];

CPLR § 214 [4]). Jonathan's claim for breach of fiduciary duty seeks primarily monetary relief: he demands that the Defendants "return and pay back to the Corporation" damages in the form of "profits they derived, for which they were unjustly enriched to the Corporation's detriment, for wasting Corporation assets, and for self-dealing," to "disgorge" "excessive and unauthorized compensation" and "profits," and to pay "punitive damages" (Troffa Aff., Ex. A, ¶¶ 90-94). The claim is exclusively monetary in nature, so a three-year statute of limitations unquestionably applies (*see Elmakies v Sunshine*, 113 AD3d at 815).

Jonathan filed the Petition/Complaint on June 27, 2016 (*see* Troffa Aff., Ex. A). Under the three-year statute of limitations, any alleged transactions before June 27, 2013 are time barred. Undisputed documentary evidence, including Jonathan's own sworn Affidavit, demonstrates that all six real property transactions for which Jonathan seeks damages in his fiduciary duty claim occurred before June 27, 2013 (Troffa Aff., Ex. B, ¶¶ 9-15; Exs. F-L), specifically, on various dates between January 15, 1980, for the acquisition of Parcel #1 and March 12, 2013, for the acquisition of Parcel #6 (*see supra* at p. 4)

Therefore, the Court should dismiss the Second Cause of Action as to any events that occurred before June 27, 2013, including all six real property transactions alleged in the Petition/Complaint.

Point II

THE THIRD CAUSE OF ACTION FOR CONSTRUCTIVE TRUST FAILS TO PLEAD THE ESSENTIAL ELEMENT OF REASONABLE RELIANCE

Under CPLR 3211 (a) (7), the Court may dismiss a complaint where it "fails to state a cause of action." Where "the complaint fail[s] to adequately allege the essential elements of a cause of action," dismissal is warranted under CPLR 3211 (a) (7) (*Mariano v Fiorvante*, 118 AD3d 961, 962 [2d Dept 2014]).

The Court should dismiss the Third Cause of Action in the Petition/Complaint for constructive trust for failure to adequately allege the essential element of reliance (Troffa Aff., Ex. A, ¶¶ 95-98).

A. <u>The Complaint Does Not Allege that Jonathan Made Any Transfers in Reliance</u>

"The necessary elements for imposition of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance on that promise, and (4) unjust enrichment" (*Igneri v Igneri*, 125 AD3d 813, 814 [2d Dept 2015]). A court must dismiss a claim for constructive trust where the complaint "failed to allege that the plaintiff made a transfer in reliance on a promise made to him" (*Spitz v Klein*, 33 AD3d 988, 990 [2d Dept 2006]).

Here, the Petition/Complaint fails to allege that Jonathan or the Corporation transferred any property in reliance on promises made to them (Troffa Aff., Ex. A, ¶¶ 95-98). Instead, Jonathan alleges that certain unnamed third parties transferred parcels of real property to NIMT, L.J.T. and Joseph (*see, e.g., id.*, ¶¶ 27-31, 38-41). Further, as alleged in the Petition/Complaint, the complained of transfers were made "without Jonathan's knowledge or consent" (*see, e.g.,* Troffa Aff., Ex. A, ¶¶ 34, 36, 41, 46). Therefore, any alleged transfers, including of the Compost Yard, were made independently of any alleged promises to Jonathan.

B. <u>Jonathan Cannot Plead or Prove Reasonable Reliance as a Matter of Law</u>

For at least four reasons, Jonathan would be unable to plead or prove reasonable reliance as a matter of law.

First, the six real property transactions at the heart of the Petition/Complaint were all duly recorded, a matter of public record and easily verifiable (Troffa Aff., Ex. B, ¶¶ 9-15; Exs. F-L). "Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance

on his opponent's misrepresentations" (*Urstadt Biddle Props., Inc. v Excelsior Realty Corp.*, 65 AD3d 1135, 1137 [2d Dept 2009] [internal quotations omitted]; *see e.g. Wildenstein v 5H & Co., Inc.*, 97 AD3d 488, 490 [1st Dept 2012] ["defendants correctly argue that plaintiff could not have reasonably relied on Stojanovic's misrepresentation of possession of the requisite licenses, as this circumstance is easy to verify through public records"]; *Fariello v Checkmate Holdings, LLC*, 82 AD3d 437, 438 [1st Dept 2011] ["such information was readily verifiable through public records and there could be no justifiable reliance on the misrepresentations"]).

Second, Jonathan is an officer of the Corporation and alleges (erroneously) that he has been a director of the Corporation since 1995 (Troffa Aff., Ex. A, ¶¶ 4-5). "It is firmly established that the directors of a corporation have the fiduciary obligation to act on behalf of the corporation . . . with reasonable care so as to protect and advance its interests" (*Pebble Cove Homeowners' Assn. Inc. v Shoratlantic Dev. Co., Inc.*, 191 AD2d 544, 545 [2d Dept 1993]). By alleging that he did not apprise himself of the true nature of the real property transactions at issue, Jonathan practically requires the Court to find that he did not exercise due care. A plaintiff's negligence "precludes the assertion of justifiable reliance" (*Vulcan Power Co. v Munson*, 89 AD3d 494, 495 [1st Dept 2011] [internal quotations omitted]).

Third, as Jonathan swore in the Petition/Complaint and in his Affidavit, the Corporation has, for many years, paid "rent" for five of the real properties and "monthly payment to be applied against the purchase price" for the sixth (Troffa Aff., Ex. A, ¶¶ 27-31, 35-43; Ex. B, ¶¶ 11, 15, 42). Thus, Jonathan admittedly had actual knowledge that the Corporation did not own the six real properties.

Fourth, Jonathan admits that he is a member of NIMT, a limited liability company (Troffa Aff., Ex. M), which owns three of the properties: (i) "Parcel #1," (ii) "Parcel 4" and (iii)

"Parcel #5" (Troffa Aff., Ex. B, ¶ 11 at 3; *compare* Troffa Aff., ¶¶ 11, 13, 14 and Exs. H, J, K). Jonathan's claim that he relied on misrepresentations regarding the true beneficial ownership of these properties is belied by the fact that year after year since 1997, Jonathan was issued and received Form K-1s with his allocation of the rental income and profits/losses from NIMT's ownership and leasing of the properties to the Corporation (*see* Troffa Aff., Ex. N). Jonathan therefore cannot have reasonably believed that NIMT was not the true legal and beneficial owner of these properties.

Point III

THE STATUTE OF LIMITATIONS BARS THE THIRD CAUSE OF ACTION FOR CONSTRUCTIVE TRUST

If the Court does not dismiss the Third Cause of Action for constructive trust for failure to plead a valid claim (*see* Point II above), then the Court should partially dismiss it based on the statute of limitations which bars Jonathan's constructive trust claim for any transactions predating June 27, 2010, six years before Jonathan filed the Petition/Complaint.

A cause of action for constructive trust is governed by a six-year statute of limitations (*see Butt v Malik*, 114 AD3d 716, 717 [2d Dept 2014]; *see* CPLR § 213 [1]). "A determination of when the cause of action accrued depends upon whether the constructive trustee acquired the property wrongfully—in which case the cause of action accrued on the date of acquisition—or whether the constructive trustee wrongfully withheld property acquired lawfully from the beneficiary—in which case the cause of action accrued when the trustee breached or repudiated the agreement to transfer the property" (*see Loeuis v Grushin*, 126 AD3d 761, 765 [2d Dept 2015]).

Here, Jonathan alleges that the six real properties were "purchased with funds derived from the Corporation without proper authorization" and that "payments by the Corporation" for the properties "were not authorized or approved by the board of directors" (Troffa Aff., Ex. A, ¶¶ 34, 36). Jonathan thus alleges that NIMT, L.J.T and Joseph acquired the properties "wrongfully," so the six-year statute of limitations began running when the properties were acquired (*Loeuis v Grushin*, 126 AD3d at 765).

Jonathan's claim for a constructive trust is time barred with respect to five of the six real property transactions alleged in the Amended Complaint (*see* Point I, *supra*, at pp. 5-7). Therefore, the Court should dismiss the Third Cause of Action for constructive trust with respect to each of the five parcels.

Point IV

THE STATUTE OF FRAUDS BARS THE FOURTH CAUSE OF ACTION TO QUIET TITLE

The Court should entirely dismiss the Fourth Cause of Action in the Petition/Complaint for "quiet title" (Troffa Aff., Ex. A, ¶¶ 99-105). Under the statute of frauds, an interest in real property is unenforceable unless memorialized in a writing signed by the party against whom enforcement is sought (General Obligations Law § 5-703 [3]; *see e.g. Gora v Drizin*, 300 AD2d 139, 139 [1st Dept 2002]).

Here, the claim for quiet title seeks a judgment "adjudging and finally determining that the Corporation is vested with an absolute and unencumbered title in fee to the property described as the Compost Yard" (Troffa Aff., Ex. A, at 16). The undisputed documentary evidence, namely, a duly recorded deed, shows that Joseph is the sole title owner of the "Compost Yard," which he acquired on March 12, 2013 (Troffa Aff., ¶ 15 and Ex. L; *compare* Ex. B, ¶ 11). The Petition/Complaint does not allege the existence of any writing by which the

Corporation could claim an ownership interest in the Compost Yard (Troffa Aff., Ex. A, ¶¶ 99-105). Therefore, Jonathan's claim that the Corporation is "vested with an absolute and unencumbered title in fee" to the Compost Yard is barred by the statute of frauds (Troffa Aff., Ex. A, at 19).

Point V

THE COURT SHOULD DISMISS THE SECOND, THIRD AND FOURTH CAUSES OF ACTION IN THE PETITION/COMPLAINT FOR LACK OF STANDING

The Court should dismiss the Second, Third and Fourth Causes of Action in the Petition/Complaint, because Jonathan lacks standing to bring suit in the name of the Corporation (CPLR 3211[a][3]). It is firmly established that where there are only two shareholders, each holding a 50% stock interest in the corporation, an action cannot be maintained in the name of the corporation by one stockholder against the other (*see L.W. Kent and Co., Inc. v Wolf*, 143 AD2d 813, 814 [2d Dept 1988]; *Sports Legends Inc. v Carberry*, 61 AD3d 449, 450 [1st Dept 2009]; *Executive Leasing Co. Inc. v Leder*, 191 AD2d 199, 200 [1st Dept 1993]). This is because, under New York law, a corporation must manage its business, including the commencement of an action in the corporation's name, under the direction of its board of directors (BCL § 701; *Sterling Indus. v Ball Bearing Pen Corp.*, 298 NY 483, 492 [1949]). The board of directors of the Corporation has not authorized Jonathan to commence this action (*see* Troffa Aff., Ex. B, ¶ 6 [alleging that "there has never been a directors' meeting"]). Therefore, Jonathan lacks capacity to bring suit in the name of the Corporation.

Point VI

IF NOT STRICKEN, THE AMENDED COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY

The Amended Complaint, which simply recasts the Second, Third and Fourth Causes of Action in the Petition/Complaint as the First, Second and Third Causes of Action, must likewise be dismissed to the extent that it is not otherwise declared a nullity. The Amended Complaint's Fourth Cause of Action asserting a shareholder derivative action should also be dismissed at least in part, because in addition to the substantive deficiencies noted above, the Amended Complaint fails to sufficiently allege Jonathan's contemporaneous stock ownership.

A. The First, Second and Third Causes of Action Should be Dismissed

If the Court does not find the Amended Complaint a nullity, then the Court should dismiss its First, Second and Third Causes of Action for the same reasons that the Second, Third, and Fourth Causes of Action in the Petition/Complaint must be dismissed—namely, that Jonathan lacks standing to bring them in the Corporation's name (*see* Point V, *supra*). The Amended Complaint provides no new allegations suggesting that Jonathan has been authorized by the Corporation to bring this action in its name. Consequently, the First, Second and Third Causes of Action must be dismissed.

B. The Fourth Cause of Action Should be Dismissed

The Amended Complaint's Fourth Cause of Action, which asserts a derivative claim by Jonathan as a 50% shareholder of the Corporation, must also be dismissed because it is substantively deficient. The Fourth Cause of Action adds no new allegations to salvage the Petition/Complaint's deficiencies, discussed in Points I through III, *supra*, namely that:

- The causes of action for breach of fiduciary duties and constructive trust are barred by the statute of limitations (*see* Point I);

- The cause of action for constructive trust fails to properly state a claim for relief (*see* Point II; and

- The cause of action to quiet title is barred by the statute of frauds (*see* Point III).

Consequently, the Fourth Cause of Action should be dismissed in its entirety.

Moreover, the Amended Complaint fails to allege contemporaneous stock ownership. "Business Corporation Law § 626(b) requires the plaintiff to be a shareholder at the time of the transaction of which he or she complains" (*Gabel v Gabel*, 104 AD3d 910, 911 [2d Dept 2013]). Here, Jonathan alleges that he became a shareholder on December 28, 1995 (Troffa Aff., Ex. E, ¶ 20). However, because the Amended Complaint is not specific as to when many of the alleged transactions occurred (*see, e.g.*, Troffa Aff., Ex. E, ¶¶ 27, 29, 34, 37, 45, 48,), Jonathan has failed to establish that he was a shareholder at the time of these alleged transactions (*see JAS Family Trust v Oceana Holding Corp.*, 109 AD3d 639, 642 [2d Dept 2013] (holding that "[i]nasmuch as the plaintiff's allegations failed to identify with particularity the transactions underlying the . . . causes of action, [he] failed to assert that [he] owned shares at the time of the transaction of which [he] complain[s]" [internal quotations omitted]).

In any event, the documentary evidence conclusively establishes that Joseph acquired "Parcel #1" a/k/a the "Main Yard" on January 15, 1980, and L.J.T. acquired "Parcel #2" on October 7, 1992 (Troffa Aff., ¶¶ 9-10 and Ex. F and G; compare Ex. B, ¶ 11). As a matter of law, Jonathan lacks standing under BCL § 626 to sue for damages based on those alleged transactions, or any others, prior to December 28, 1995. Therefore, assuming arguendo that Jonathan can overcome the other pleading defects identified, the Court at the very least should partially dismiss the Fourth Cause of Action in the Amended Complaint for lack of standing.

CONCLUSION

For all of the foregoing reasons, the Court should issue an Order: (i) partially dismissing the Petition/Complaint; (ii) in the alternative, partially dismissing the Amended Complaint; and (iii) awarding such other and further relief as the Court deems just and proper.

Dated: September 16, 2016

FARRELL FRITZ, P.C.

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