

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LARISSA OKUN NUSIMOW, derivatively on behalf
of 600-602 10th Avenue Realty Corporation and on her
own behalf,

Plaintiff,

-against-

ESTER PINCHEVSKY, 600-602 10th AVENUE
REALTY CORPORATION,

Defendants.

Index No.

COMPLAINT

Plaintiff, Larissa Okun Nusimow (“Plaintiff”) by her attorneys Davis & Gilbert LLP, as
and for her Complaint against defendant Ester Pinchevsky (“Pinchevsky” or “Defendant”) and
nominal defendant 600-602 10th Avenue Realty Corporation (“Nominal Defendant” or “the
Corporation”), brings this suit derivatively with respect to certain claims and on her own behalf
with respect to certain claims and alleges as follows:

NATURE OF ACTION

1. Plaintiff brings this cause of action against Pinchevsky for her financial
misconduct and gross mismanagement as President and 50% shareholder of the 600-602 10th
Avenue Realty Corporation.

2. For many years, Pinchevsky has failed to perform required corporate functions.
For example, Pinchevsky has failed to provide shareholders with stock certificates, failed to
negotiate a governing shareholder agreement as required by a 2008 judicial settlement, failed to
conduct annual shareholder meetings as required by the corporate by-laws, made unilateral
decisions without shareholder approval, denied Plaintiff access to books and records, failed to

hold any board meetings to elect new officers, failed to maintain the minimum required number of directors, failed to chair all corporate meetings, and failed to appoint a treasurer or secretary for the Corporation as required by the corporate by-laws.

3. Pinchevsky has also taken advantage of her position to misappropriate corporate funds and assets for her own benefit and to the detriment of the Corporation. First, since 2008, Pinchevsky has improperly subleased an apartment owned by the Corporation for personal gain. In addition Pinchevsky has taken improper reimbursement for personal expenses without providing necessary receipts, and adjusted her own salary to pay herself out of the Corporation's coffers without following the proper procedures.

4. Recently, Pinchevsky's misconduct has grown increasingly brazen. On December 29, 2020, Pinchevsky took an "owner distribution" of \$64,000 without providing for any distribution to Larissa Nusimow, the other 50% owner of the corporation. This distribution was purportedly for "2019 taxes," but in fact, this distribution was wrongful as it was taken with no proper basis.

5. As a result of this repeated misconduct, Plaintiff seeks the following relief: (1) damages against Pinchevsky for her repeated misconduct derivatively on behalf of the Corporation; (2) access to the books and records of the Corporation; (3) an accounting; and (4) the removal of Pinchevsky as a corporate officer for cause pursuant to BCL § 706(d).

THE PARTIES

6. Plaintiff Larissa Okun Nusimow is a 50% shareholder in the Corporation.

7. Defendant Ester Pinchevsky is a 50% shareholder in the Corporation, and has served as its President since April 1993.

8. Nominal Defendant 600-602 10th Avenue Realty Corporation is a New York business corporation.

ALLEGATIONS COMMON TO ALL CLAIMS

9. Nominal Defendant is a domestic business corporation formed in May 1979. At its formation, the Corporation contained the following shareholders, with their respective percentage of shares: Sol Lieberman – 52%, Hy Nusimow – 24%, and Defendant Pinchevsky – 24%. Hy Nusimow is the late husband of Plaintiff.

10. Upon information and belief, the Corporation’s sole asset is a mixed-use building located at 602 Tenth Avenue in New York, New York (the “Building”).

11. Over time, the Corporation went through several restructuring episodes, resulting in 50% of the shares of the Corporation being held by Hy Nusimow, and 50% of the shares being held by Pinchevsky.

12. Plaintiff became a 50% shareholder in the Corporation by operation-of-law when her husband, Hy Nusimow, passed away in 2016.

13. Pinchevsky has served as President of the Corporation since April 1993. As President of the Corporation, Pinchevsky is in a position of trust and confidence and owes fiduciary duties to the Corporation.

14. There are currently no other officers or directors of the Corporation.

15. In her capacity as President, Pinchevsky has mismanaged the Corporation for years.

16. For example, Pinchevsky has failed to hold either a shareholder meeting, or a meeting to elect new directors or officers, since at least 2008. According to the Corporation’s by-laws, an annual meeting is supposed to be held every July.

17. In addition, from 2008 to present, Pinchevsky has failed to: 1) provide shareholder stock certificates; 2) negotiate a shareholder agreement as required by a 2008 judicial settlement entered with the then shareholders; 3) maintain the minimum required number of corporate directors; 4) chair all corporate meetings as required by the Corporation's by-laws; and 5) appoint a treasurer and secretary of the corporation as required by the by-laws.

18. Pinchevsky has also denied Plaintiff access to the books and records of the Corporation despite Plaintiff's entitlement as a shareholder to these books and records. Plaintiff has made multiple requests for the same based on her concerns about Pinchevsky's mismanagement. Specifically, Plaintiff made a written demand for records relating to the Corporation on July 23, 2016, and again made a demand for the annual balance sheet and profit and loss statement pursuant to BCL § 624(e) on December 9, 2020.

19. Pinchevsky has also misappropriated corporate funds and assets for her own benefit. First, since 2008, Pinchevsky has improperly subleased an apartment in the Building for personal gain. Upon information and belief, the monthly rent of this apartment is approximately \$2,000 per month.

20. In addition, Pinchevsky has taken reimbursement of approximately \$350 per month for alleged "telephone and fax expenses" from the Corporation's coffers without providing necessary receipts. This lack of receipts implies that Pinchevsky is improperly supplementing her income through these reimbursements.

21. Pinchevsky has also adjusted her own salary without following the proper procedures. Pinchevsky's salary is paid out of the Corporation's coffers.

22. Recently, Pinchevsky's misconduct has grown increasingly brazen. On December 29, 2020, Pinchevsky took an owner distribution from the Corporation of \$64,000.

This distribution was purportedly for “2019 taxes,” but there was no justifiable tax reason for this distribution. Pinchevsky took that “owner distribution” without making any distribution to the corporation’s other 50% owner.

23. The foregoing conduct by Pinchevsky has breached her fiduciary duties to the Corporation, and caused harm to the Corporation.

24. In addition, Pinchevsky’s conduct constitutes cause for removal within the meaning of BCL § 706(d). Pinchevsky must be removed from her position as President of the Corporation in order to protect the Corporation from her continuing misconduct.

25. In light of Pinchevsky’s years of misconduct, Plaintiff, as a 50% shareholder of the Corporation, brings this action derivatively to recover damages from Pinchevsky on behalf of the Corporation, to gain access to the Corporation’s books and records, for an accounting, and to secure Pinchevsky’s removal as President.

A SHAREHOLDER DEMAND WOULD BE FUTILE

26. A shareholder may bring a derivative suit on behalf of a corporation without first demanding that the corporate board bring suit if such a demand would be futile.

27. Making a demand to the Corporation’s board in this case would be futile. As President and a 50% shareholder, Pinchevsky would be required to approve the initiation of suit by the Corporation, particularly as there are currently no other officers or directors of the Corporation. Given that this lawsuit relates to misconduct by Pinchevsky, making a demand upon her would be futile.

28. Moreover, as a result of Pinchevsky’s failures to hold corporate meetings to elect new board members, there is no currently constituted board to whom Plaintiff could even submit a demand other than Pinchevsky herself.

29. In addition, the conduct at issue in this case, which involves the flagrant misappropriation of corporate assets by Pinchevsky, is so egregious that it could not have possibly been the product of sound business judgment.

30. As such, Plaintiff is entitled to bring suit derivatively on behalf of the Corporation without first making a demand on the board because such a demand would be futile.

AS AND FOR A FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty)
(Derivatively on behalf of Corporation)

31. Plaintiff repeats and restates each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth at length herein.

32. Plaintiff is a 50% shareholder in the Corporation, and a demand on the board of the Corporation would be futile.

33. As President of the Corporation, Pinchevsky owes the Corporation fiduciary duties. Pinchevsky has breached these fiduciary duties by, among other actions: (1) improperly subleasing an apartment in the Building with a rental value of approximately \$2,000 per month; (2) taking reimbursements without the proper receipts; (3) improperly adjusting her own salary; (4) taking a wrongful distribution in the amount of \$64,000 in December 2020; and (5) refusing to hold shareholder or board meetings as required by the ByLaws or to provide required corporate information to the other 50% shareholder.

34. Pinchevsky's repeated breaches of her fiduciary duties have caused injury to the Corporation in amounts to be determined at trial, but in any event not less than the cash amount(s) it is determined Pinchevsky misappropriated and fair market value of the non-cash Corporation assets she has diverted to her personal use.

35. Plaintiff, acting in her capacity as a 50% shareholder, demands judgment derivatively on behalf of the Corporation in that amount.

AS AND FOR A SECOND CAUSE OF ACTION**(Corporate Waste)****(Derivatively on behalf of Corporation)**

36. Plaintiff repeats and restates each of the allegations contained in the preceding paragraphs of this Complaint as if set forth at length herein.

37. Plaintiff is a 50% shareholder in the Corporation, and a demand on the board of the Corporation would be futile.

38. Pinchevsky has diverted corporate assets by among other actions: (1) improperly subleasing an apartment in the Building with a rental value of approximately \$2,000 per month; (2) taking reimbursements without the proper receipts; (3) improperly adjusting her own salary; and (4) taking a wrongful distribution in the amount of \$64,000 in December 2020.

39. Pinchevsky's diversion of corporate assets was done improperly, and not for a necessary purpose.

40. Pinchevsky's waste has caused injury to the Corporation in amounts to be determined at trial, but in any event not less than the cash amount(s) it is determined Pinchevsky misappropriated and fair market value of the non-cash Corporation assets she has diverted to her personal use.

41. Plaintiff, acting in her capacity as a 50% shareholder, demands judgement derivatively on behalf of the Corporation in that amount.

AS AND FOR A THIRD CAUSE OF ACTION**(Demand for Books and Records)**

42. Plaintiff repeats and restates each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth at length herein.

43. As a shareholder of the Corporation, Plaintiff has both a statutory and common law right to inspect the Corporation's books and records.

44. Plaintiff has made repeated demands for these books and records, which Pinchevsky has refused to provide.

45. Plaintiff seeks these books and records due to concern over Pinchevsky's mismanagement and wrongful misappropriation of corporate assets, a good faith and valid purpose.

46. Without access to these books and records, it is not possible for Plaintiff to determine the full scope of Pinchevsky's misconduct.

47. Accordingly, Plaintiff requests an order permitting her to inspect and examine the books and records of the Corporation, as well as an annual balance sheet and profit and loss statement pursuant to BCL § 624(e).

AS AND FOR A FOURTH CAUSE OF ACTION
(Request for an Accounting)

48. Plaintiff repeats and restates each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth at length herein.

49. As President of the Corporation, and a 50% shareholder, Pinchevsky owes fiduciary duties to Plaintiff.

50. As discussed above, Pinchevsky has mismanaged the Corporation and misappropriated profits and revenues received by the Corporation.

51. Plaintiff is currently unable to determine the full amount so misappropriated, and the full extent of Pinchevsky's mismanagement.

52. Plaintiff seeks an accounting by Pinchevsky of all books, records, financial statements, income, revenues, expenses, profits, benefits, losses, liabilities, obligations, distributions and other financial transactions since 2008, and payment by Pinchevsky to Plaintiff of any distributions or other funds owed.

AS AND FOR A FIFTH CAUSE OF ACTION
(Removal of Pinchevsky as President)

53. Plaintiff repeats and restates each of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth at length herein.

54. As a 50% shareholder, Plaintiff is entitled to bring an action seeking the removal of a corporate director for cause pursuant to BCL § 706(d).

55. Pinchevsky's conduct described herein, including her failure to perform required corporate functions, and her misappropriation of corporate assets, constitutes cause warranting her removal from the office of President of the Corporation.

56. Plaintiff accordingly requests an order removing Pinchevsky as President of the Corporation for cause, and barring her from re-election for a period to be determined by the Court.

WHEREFORE, Plaintiff respectfully requests final judgment against Defendant as follows:

- (a) For judgment against Pinchevsky on all Counts in an amount to be determined at trial;
- (b) For an order directing that Plaintiff be provided with access to the Corporation's books and records;
- (c) For an order directing that Pinchevsky provide Plaintiff with an accounting;
- (d) For an order removing Pinchevsky for cause as President of the Corporation and barring her from re-election;
- (e) For interest, costs and disbursements of this action,
- (f) For such other and further relief as may be just and proper.

Dated: New York, New York
March 3, 2021

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