STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

KEVIN LAURILLIARD and
PAUL C. PASTORE,

Plaintiffs,

-against-

DECISION & ORDER

MCNAMEE LOCHNER, P.C., SCOTT A. BARBOUR, RICHARD C. CIRINCIONE, APRIL DALBEC, MICHELLE HASKIN, RICHARD LANGER, AMY O'CONNOR, JOHN PRIVITERA, MEGAN VAN AKEN, BRUCE WAGNER, JOHN DOES 1 through 10,

Defendants.

Index No. 904245-22

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Plaintiffs Kevin Laurilliard and Paul C. Pastore bring this commercial action against the law firm of McNamee Lochner, P.C., where they practiced for decades, as well as nine individuals alleged to be "majority shareholders" of the law firm (*see* NYSCEF Doc No. 9 ["Complaint"], ¶¶ 5-6).

Defendants move for the pre-answer dismissal of the Complaint under CPLR 3211 (a) (1) and (7). Plaintiffs oppose the motion.

BACKGROUND

A. Plaintiffs' Allegations

McNamee Lochner, P.C. ("ML" or "Firm") was a venerable Albany law firm, and plaintiffs were its longtime shareholders/employees (*see* Complaint, ¶¶ 9-11). Defendants Cirincione and Barbour were the Firm's managing shareholders (*see id.*, ¶ 13).

On February 19, 2020, a special meeting of ML shareholders was held to discuss a "'potential merger'" with Whiteman, Osterman & Hanna LLP ("WOH") (*id.*, ¶ 14). Plaintiffs were not supportive of a merger, but a majority of the ML shareholders agreed to explore the opportunity (*see id.*, ¶¶ 15-16). ML's discussions with WOH were conducted by Cirincione and Barbour, who insisted that all communications go through them (*see id.*, ¶ 17).

"On March 13, 2020, Barbour advised Laurilliard that he was offered a 'transitional partnership' from WOH" (*id.*, ¶ 19). On the same day, "Cirincione and Barbour verbally advised Pastore that he did not receive an offer from WOH" (*id.*, ¶ 20). No details were disclosed to plaintiffs about the other offers made by WOH to ML shareholders or the reasons for WOH's hiring decisions (*see id.*, ¶ 22).

"On March 16, 2020, Cirincione and Barbour gave all ML shareholders that received WOH offers until 5:00 PM on March 19, 2020 to accept these offers" (*id.*, ¶ 23). "Plaintiffs still desired for ML's shareholders to reject the offers from WOH and to continue to operate ML as a law firm" (*id.*, ¶ 24).

"At 9:28 am on March 19, 2020, Laurilliard emailed Cirincione and Barbour and asked whether it was possible to continue to operate ML as a law firm" (*id.*, ¶ 25). His email stated:

> In order for me to make an informed decision I still need to know, among other things, whether our current attorneys are willing to circle the wagon[s] and continue as the venerable firm of McNamee Lochner P.C. or whether [the Firm] will definitely be winding down. Can you . . . please let me know your thoughts on that issue? (NYSCEF Doc No. 10 ["March 19, 2020 Emails"]).

Minutes later, Barbour responded: "There is no willingness to 'circle the wagons.' As stated previously, the responses received to date all have been unanimous to accept the offer from [WOH]. ML will be winding down. Please provide your response by the COB today. Thank you" (*id.*).

Cirincione then added: "I agree with [Barbour's email] and will add, that I do not see the financial viability of thinking the firm can continue. You were not the only one offered a transitional partnership" (*id.*).

Later on March 19, 2020, "ML issued a Benefit Reduction Notice . . . that the McNamee Lochner purchase pension plan contributions would cease as of April 10, 2020 and that after April 9, 2020 no participant will accrue benefits under that plan" (Complaint, ¶ 30). This "coincided with office chatter that ML attorneys and staff would be moving to WOH in the very near future" (*id.*, ¶ 31).

"On March 19, 2020 at 4:58 pm, Laurilliard informed Cirincione and Barbour that [he] was not going to accept WOH's offer" (*id.*, ¶ 32).

ML announced on March 20, 2020 that all of its "of counsel" attorneys had been terminated, and much of the office staff was fired, including plaintiffs' secretaries (*id.*, ¶ 33). However, ML's so-called "majority shareholders" retained much of their support staff (*id.*, ¶ 34).

"On March 25, 2020, Cirincione notified ML's shareholders that their salaries were going to be reduced according to a newly instituted compensation system and further iterated that Plaintiffs would not have a dedicated secretarial support staff" (*id.*, ¶ 35). "Plaintiffs continued their employment at ML with little or no secretarial support staff" (*id.*, ¶ 36).

"On April 6, 2020, Cirincione circulated a ML press release, which was published by the New York Law Journal and the Albany Business Review the same day, that announced that some of the ML attorneys would be joining WOH" (*id.*, ¶ 38).

"After receiving the press release and after hearing no further updates from Cirincione or Barbour, Laurilliard requested by email on April 6, 2020 that Cirincione and Barbour confirm that 'most of the ML's shareholders are going to become shareholders at WOH and that ML will not be conducting business going forward because ML will be winding down its business affairs'" (*id.*, ¶ 39). Otherwise, "Laurilliard would assume that most of ML's shareholders are going to become shareholders at WOH and that ML will not be conducting business going forward" (*id.*). "Cirincione and Barbour failed to respond . . ." (*id.*, ¶ 40).

"Having received no response or updates from Cirincione or Barbour, Laurilliard notified them on April 10, 2020 that he was intending to join the law firm of O'Connell and Aronowitz P.C. with an anticipated start date of April 27, 2020" (*id.*, ¶ 41).

"On April 16, 2020 at 2:17 pm, Cirincione and Barbour emailed Plaintiffs that they had to vacate their ML offices by 5:00 PM on April 17, 2020, after which Plaintiffs would no longer have any access to their ML offices, files or computer system where their client files were

maintained and stored" (*id.*, ¶ 42). "As a result, Plaintiffs were forced, during the COVID pandemic and within the arbitrary one-day deadline, to go to their offices to retrieve as many of their personal and client files as possible" (*id.*, ¶ 43).

"Following the lockout, Plaintiffs repeatedly requested ML to sign consent to change attorney forms and to access Plaintiffs' client files and escrow accounts" (*id.*, ¶ 45). In contrast to the treatment of other shareholders, "Cirincione and Barbour did not permit Plaintiffs access to their files or documents and did not forward Plaintiffs' emails" (*id.*, ¶¶ 46-48).

"Subsequent to March 20, 2020, ML had clients who wanted to be represented by Plaintiffs" (*id.*, ¶ 49). "Unless those clients paid their outstanding invoices to ML, ML refused to sign consent to change attorney forms" (*id.*, ¶ 50).

"On May 2, 2020, Cirincione requested that Plaintiffs surrender their ML shares and offered to each Plaintiff a check in the amount of $100.00" (*id.*, ¶ 53). "To date, Plaintiffs have refused to surrender their respective shares in ML" (*id.*, ¶ 54).

"On July 8, 2020, the Albany Business Review published an article announcing that 12 attorneys from ML would be joining WOH" (*id.*, ¶ 56).

"On July 9, 2020, Plaintiffs requested that ML comply with its obligations under Plaintiffs' employment and shareholder agreements and provide all information they are entitled to as shareholders that pertain to ML's winddown, including a complete financial accounting of ML's assets and liabilities from January 1, 2020 to present" (*id.*, ¶ 57). "Plaintiffs also reiterated their concerns that they had still not been provided with all client files, client escrow funds, [and] substitution of attorney forms so that they could continue to protect their clients' legal interests" (*id.*, ¶ 58). However, "[d]efendants have refused to provide any information, including, but not limited to, financial information, pertaining to ML's winddown to date" (*id.*, ¶ 59).

B. This Litigation

Plaintiffs commenced this action on June 7, 2022 through the electronic filing of a summons with notice (*see* NYSCEF Doc No. 1). Following defendants' appearances and demand for a complaint (*see* NYSCEF Doc No. 2), plaintiffs served the Complaint on December 19, 2022 (*see* NYSCEF Doc Nos. 9-10).

The Complaint alleges five causes of action: (1) anticipatory breach of plaintiffs' employment agreements; (2) anticipatory breach of plaintiffs' shareholder agreements; (3) accounting; (4) dissolution under Business Corporation Law ("BCL") § 1104-a; and (5) breach of fiduciary duty. In lieu of answering, defendants moved for dismissal under CPLR 3211 (a) (1) and/or (7).

Oral argument was held on May 23, 2023, and this Decision & Order follows.

ANALYSIS

On a motion to dismiss under CPLR 3211 (a) (7), the courts' "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation marks and citation omitted]). The complaint "is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference" (*State of New York v Jeda Capital-Lenox, LLC*, 176 AD3d 1443, 1445 [3d Dept 2019] [internal quotation marks and citations omitted]). "Dismissal . . . is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [citations omitted]).

"Under CPLR 3211 (a) (1), dismissal is warranted if documentary evidence conclusively establishes a defense as a matter of law" (*Haire v Bonelli*, 57 AD3d 1354, 1356 [3d Dept 2008] [citations omitted]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

A. Anticipatory Repudiation (Employment Agreements)

Plaintiffs allege that they entered into employment agreements with ML and performed thereunder "until the employment agreements were anticipatorily breached by ML on March 19, 2020" (Complaint, ¶¶ 61-64). ML is alleged to have "anticipatorily breached the employment agreements by unequivocally stating that ML was ceasing the practice of law in the near future" (*id.*, ¶ 65).

Defendants seek dismissal of the claim on the ground that the agreements are not enforceable contracts because they are not for a fixed duration of employment and do not set forth the salary to be paid to plaintiffs. Alternatively, defendants contend that the Complaint fails to allege an unequivocal repudiation of ML's obligations under the agreements.

"An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for . . . performance has arrived" (*Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133 [2017] [internal quotation marks and citation omitted]). The anticipatory breach "can be either a statement . . . indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach" (*id.* [internal quotation marks and citation omitted]).

"A claim of anticipatory repudiation must be supported by evidence of an unqualified and clear refusal to perform with respect to the entire contract" (*Joseph P. Carrara & Sons, Inc. v A.R. Mack Constr. Co., Inc.*, 89 AD3d 1190, 1191 [3d Dept 2011]; *see Princes Point*, 30 NY3d

at 133 ["positive and unequivocal" (internal quotation marks and citation omitted)]; *Children of Am. [Cortlandt Manor], LLC v Pike Plaza Assoc., LLC*, 113 AD3d 583, 585 [2d Dept 2014] ["unequivocal, definite, and final expression of the (party's) intention not to perform its obligations"]).

The employment agreements between plaintiffs and ML (*see* NYSCEF Doc No. 17 ["Employment Agreements"]) state a commencement date of June 12, 2015 (*see id.*, § 1), but do not prescribe any end date or specific duration of employment (*see* NYSCEF Doc No. 23 ["MOL"], p. 6). Rather, the agreements define a series of terminating events, including termination "[a]t the option of either Employer or Employee after not less than ninety days' written notice" (Employment Agreements, § 7 [e]).

"If the employer has the unconditional right to terminate the contract of employment after a certain notice, discharge has the effect of notice to terminate and damages are allowed only up to the time the contract would have terminated if notice had been given" (*Bitterman v Gluck*, 256 App Div 336, 337 [1st Dept 1939]). Thus, a termination in contravention of the notice requirement does not affect the validity of the termination, but it does leave the employer answerable for damages "up to the time the contract would have terminated if notice had been given" (*id.*; *see Delvecchio v Bayside Chrysler Plymouth Jeep Eagle*, 271 AD2d 636, 639 [2d Dept 2000]; *Guasteferro v Family Health Network of Cent. N.Y.*, 203 AD2d 905, 905 [4th Dept 1994]).

The Court therefore concludes that plaintiffs were at-will employees of the Firm who could "be terminated without cause by [ML] upon written notice" (*Naylor v Ceag Elec. Corp.*, 158 AD2d 760, 762 [3d Dept 1990]; *see UWC, Inc. v Eagle Indus.*, 213 AD2d 1009, 1011 [4th Dept 1995], *lv denied* 85 NY2d 812 [1995]).

Given plaintiffs' at-will employment with the Firm and the limited duties owed to them under the Employment Agreements, the Court further concludes that the March 19, 2020 Emails do not demonstrate a clear and unequivocal repudiation. Barbour's statement that "ML will be winding down" and Cirincione's statement that he does "not see the financial viability of thinking the firm can continue" (March 19, 2020 Emails) cannot reasonably be understood as a clear and unqualified refusal by ML to perform under the Employment Agreements, which allowed the Firm to terminate plaintiffs' employment upon written notice. No timeframe for the winding down was provided in the March 19, 2020 Emails or at the February 19, 2020 shareholder meeting (*see* NYSCEF Doc Nos. 29, 54),[1] and the March 19, 2020 Emails do not state or reasonably imply that the Firm intended to deny plaintiffs proper notice of termination.

In the absence of a clear and equivocal statement by the Firm that it intended to breach the Employment Agreements or voluntarily disable itself from performing its limited duties thereunder, plaintiffs have not stated a claim for anticipatory repudiation. The first cause of action therefore is dismissed.[2]

B. Anticipatory Repudiation (Shareholder Agreements)

Plaintiffs similarly allege that "ML anticipatorily breached the shareholder agreements by unequivocally stating," on or before March 19, 2020, that the Firm "was ceasing the practice of law in the near future" (Complaint, ¶ 71). "ML then subsequently further breached the

[1] As plaintiffs observed at oral argument, the version of the meeting minutes submitted by defendants is missing a paragraph of text that appears in plaintiffs' version (*see id.*).

[2] Plaintiffs have not alleged a more limited claim for breach of the notice obligation and, in any event, such a claim would lack merit. In the absence of an anticipatory repudiation by ML, it was plaintiffs who may have first breached the Employment Agreements by leaving on 17 days' notice (*see* Complaint, ¶ 41 [Laurilliard]). Moreover, plaintiffs represented at oral argument that they had been paid by ML until the start of their new employment on April 27, 2020 (*see* Employment Agreements, § 2 [obliging ML employees to devote "full time and attention" to the Firm]).

shareholder agreements by formulating a plan to liquidate ML and to distribute its assets to the defendants and to the exclusion of Plaintiffs" (*id.*, ¶ 72).

The shareholder agreements between plaintiffs and ML (*see* NYSCEF Doc No. 18 ["Shareholder Agreements"]) are "part of a series of identical Agreements between [the Firm] and all of its shareholders," by which each admitted shareholder received one share of ML stock, subject to a mandatory buy-back upon certain triggering events (*id.*, § 1 & Whereas).

"In the event the Shareholder terminates or has terminated his [or her] employment with the [Firm], then the share owned by him [or her] shall be offered . . . in accordance with Section 1 of this Agreement" (*id.*, § 4). Section 1, in turn, obliges the shareholder to deliver to an officer of the Firm the offered share, duly endorsed for transfer, and it requires the Firm to purchase the share for $100, payable within six months of delivery (*see id.*, § 1).

Plaintiffs' employment with ML terminated no later than April 27, 2020 (*see* Complaint, ¶¶ 41-44; NYSCEF Doc No. 43 ["Pastore Aff."], ¶¶ 7, 10; NYSCEF Doc No. 27 ["Laurilliard Aff."], ¶¶ 4, 25-27), and, for the reasons stated in Part A, *supra*, the terminations were legally effective even if plaintiffs were not accorded proper notice. Thus, absent an anticipatory repudiation of the Shareholder Agreements by ML, plaintiffs were obliged to tender their shares to the Firm within five days of termination (*see* Shareholder Agreements, §§ 1, 4), a duty that plaintiffs admittedly have refused to perform (*see* Complaint, ¶ 54), despite the Firm's demand and tender of the purchase price (*see id.*, ¶ 53).

The Court concludes that neither the March 19, 2020 Emails nor anything said at the February 19, 2020 shareholder meeting amounts to a repudiation by ML of its obligations under the Shareholder Agreements. The Shareholder Agreements did not prevent the Firm from winding down or "ceasing the practice of law in the near future" (*id.*, ¶ 71). In fact, the Firm's

only obligation to plaintiffs under the Shareholder Agreements is to pay the $100 purchase price for an offered share, and plaintiffs acknowledge that the Firm has tendered its performance. Thus, it is plaintiffs who are in breach of the Shareholder Agreements by refusing to deliver their shares to ML, duly endorsed for transfer.

Plaintiffs further allege that ML "subsequently further breached the shareholder agreements by formulating a plan to liquidate [the Firm] and to distribute its assets to the defendants and to the exclusion of Plaintiffs" (*id.*, ¶ 72). As defendants correctly observe, however, the Shareholder Agreements do not speak to dissolution, liquidation, winding down or the distribution of assets to members upon dissolution, and the Complaint does not identify any provision of the Shareholder Agreements that was breached.[3]

C. Accounting

"An equitable accounting involves a remedy 'designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession'" (*Hall v Louis*, 184 AD3d 437, 438-439 [1st Dept 2020], quoting *Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011]). "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Jacobs v Cartalemi*, 156 AD3d 605, 608 [2d Dept 2017] [internal quotation marks and citation omitted]).

[3] There is no merit to plaintiffs' contention that the buy-sell terms of the Shareholder Agreements manifest the implicit intention of treating the Firm as if it were a partnership upon dissolution. Rather, the agreements appear to be straightforward buy-sell agreements.

Plaintiffs claim to be entitled to an accounting because of their status as "law partners and fellow shareholders and directors" (NYSCEF Doc No. 45, p. 12).[4] But under the Shareholder Agreements, the termination of plaintiffs' employment in April 2020 triggered a mandatory duty on the part of plaintiffs to deliver their shares to ML in a form endorsed for transfer, a duty that plaintiffs admittedly have refused to perform, despite ML's tender of the purchase price (*see* Part B, *supra*).

Under the circumstances, the Court concludes that plaintiffs have been divested, at least equitably, of any rights as shareholders or directors of ML, and, therefore, lack standing to maintain a claim for an equitable accounting.

D. Dissolution

The fourth cause of action seeks dissolution under BCL § 1104-a, which allows the "holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation" to seek dissolution for "fraudulent or oppressive actions" (*id.* [a] [1]).

Before ordering dissolution under BCL § 1104-a, a court must consider: (i) whether "liquidation . . . is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment"; and (ii) "[w]hether liquidation . . . is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners" (*id.* [b]).

For the reasons stated in Part C, *supra*, the Court concludes that plaintiffs lack standing to maintain a claim for dissolution under BCL § 1104-a.

And even if plaintiffs were entitled to sue as oppressed shareholders, despite their refusal to redeem their shares under the Shareholder Agreements for the agreed-upon repurchase price,

[4] All ML shareholders are directors (*see* Laurilliard Aff., n 1).

the allegations of the Complaint conclusively establish that the dissolution of ML under BCL § 1104-a is unwarranted as a matter of law. In light of the plain language of the Shareholder Agreements, the only "return" that plaintiffs reasonably could have expected on their shares was redemption at the price of $100 per share upon the termination of their employment, and the judicial dissolution of ML is not required for plaintiffs to obtain that return.

Accordingly, the fourth cause of action is dismissed.

E. Breach of Fiduciary Duty

The fifth cause of action seeks damages for breach of fiduciary duty. Plaintiffs allege that defendants owed fiduciary duties to them as shareholders of ML, and defendants breached those duties by engaging in misconduct, including:

> ML's majority shareholders' de facto merger with WOH; ML's majority shareholders' freeze out of Plaintiffs upon notice of only one day; ML's majority shareholders' termination of Plaintiffs' staff, thereby seriously impairing Plaintiffs' ability to provide effective legal representation to Plaintiffs' clients, because Plaintiffs were not joining WOH; ML's majority shareholders' callous disregard of their clients who wanted to be represented by Plaintiffs; ML's majority shareholders' intentional refusal to sign a consent to change attorney form that would honor a client's right to be represented by the attorney of their choice unless the client paid all outstanding invoices owed to ML; ML's majority shareholders' refusal to permit Plaintiffs access to and review of ML's corporate financial books and records (Complaint, ¶¶ 94-95).

"The elements of a cause of action . . . for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017] [internal quotation marks and citation omitted]).

"A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b)" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011] [citations omitted]).

Defendants first argue that plaintiffs "have failed to articulate the existence of a fiduciary relationship between the parties following their move to [the new law firm] in April 2020" (MOL, p. 17). The Court agrees that the parties' fiduciary relationship was severed by the termination of plaintiffs' employment, which triggered plaintiffs' obligation under the Shareholder Agreements to tender their shares to ML for repurchase at the price of $100 per share. However, this argument does not dispose of the breaches of fiduciary duty alleged to have occurred prior to severance.

Defendants further contend that the allegations supporting the claim are insufficiently particularized:

> For example, Plaintiffs fail to provide (i) the specific misconduct of any one Defendant in connection with this claim, (ii) the period of time and/or duration that their clients were allegedly impacted by Defendants['] purported behavior, (iii) the names or number of clients purportedly impacted, (iv) how Plaintiffs were impaired in their representation of these alleged clients, (v) date(s) they requested to see ML's books and records and to whom these requests were made, (vi) date(s) and name(s) of the Defendants who purportedly refused them access to said materials, and (vii) how Defendants' alleged actions correspond to any damages suffered by Plaintiffs, or the amount of these purported damages (*id.*, pp. 17-18).

The Court does not find this argument to be persuasive. The heightened pleading requirement of CPLR 3016 (b) is met when the complaint puts the defendants on notice of the specific incidents complained of (*see New York State Workers' Compensation Bd. v SGRisk, LLC*, 116 AD3d 1148, 1154 [3d Dept 2014]), and the Court is satisfied that the Complaint, as

amplified by the affidavits submitted in opposition to the motion (*see* Laurilliard Aff.; Pastore Aff.), meets this pleading standard.

Plaintiffs allege that they were driven out of the Firm by its leadership to "avoid [plaintiffs] sharing with Defendants in the distribution of [ML's] net assets" (Pastore Aff., ¶ 48), including $600,000 in federal payroll protection plan ("PPP") funds approved for ML on or about April 11, 2020, of which plaintiffs were not informed (*see* Laurilliard Aff., ¶ 24; *see also* Pastore Aff., ¶ 4 ["goal was to 'squeeze out' Plaintiffs from participating in the planned wind down and liquidation"]).

Plaintiffs allege, in essence, that the Firm engaged in disparate treatment between two similarly-situated groups of shareholders: those who would be joining WOH, including the Firm's leadership; and the ML shareholders, like plaintiffs, who would not be joining WOH.[5]

The alleged "squeeze out" of the latter group began after the roster of ML shareholders who would be joining WOH was finalized on March 19, 2020 at 5:00 p.m. (*see* Complaint, ¶¶ 27, 29, 32). The following day, ML terminated the employment of plaintiffs' secretarial and support staff (*see id.*, ¶ 33; Pastore Aff., ¶ 26), while the shareholders who had agreed to join WOH "retained many of their support staff and secretaries" (Complaint, ¶ 34; *see* Laurilliard Aff., ¶ 16).

ML then informed plaintiffs (and others) that "their salaries were going to be reduced according to a newly instituted compensation system" (Complaint, ¶ 35). During this period, plaintiffs further allege that they were denied access to critical information, including whether the Firm intended to continue as a going concern (*see id.*, ¶¶ 37-40).

[5] In their papers, plaintiffs refer to the first group as "majority shareholders" and their group as "minority shareholders." As defendants correctly observe, however, all ML shareholders hold only a single share of stock.

And following Laurilliard's announcement on April 10, 2020 that he intended to join a new law firm as of April 27, 2020 (*see id.*, ¶ 41), plaintiffs were locked out of the Firm's offices (*see* Laurilliard Aff., ¶ 25; Pastore Aff., ¶¶ 7, 26), denied access to its computer systems (*see id.*), and thwarted in their efforts to transition clients (*see* Laurilliard Aff., ¶¶ 28-30).

Nonetheless, while plaintiffs' allegations are sufficiently particularized to satisfy the heightened pleading standard of CPLR 3016 (b), the Court is constrained to conclude that their allegations do not give them an enforceable right of recovery against defendants.

The bulk of fiduciary misconduct alleged by plaintiffs concerns changes to the terms and conditions of their employment, changes that were implemented, allegedly, for the purpose of driving them out of the Firm. This includes diminishing the level of secretarial and administrative support provided to them, locking plaintiffs out of the Firm's offices on one day's notice, denying them access to the Firm's computers, and interfering with their efforts to transition clients to their new firm.

But plaintiffs were not owed fiduciary duties as employees of ML, and their claimed status as minority shareholders did not entitle them to any special employment rights or protections (*see Ingle v Glamore Motor Sales*, 73 NY2d 183, 190 [1989]). And in the absence of a contract establishing a fixed duration of employment (*see* Part A, *supra*), ML was "free to modify the terms of [plaintiffs'] employment, subject only to [plaintiffs'] right to leave" the Firm (*Dwyer v Burlington Broadcasters*, 295 AD2d 745, 746 [3d Dept 2002] [internal quotation marks and citation omitted], *lv denied* 98 NY2d 611 [2002]).[6]

[6] The Court further observes that the employment relationship between plaintiffs and ML was governed by written contracts, further undermining plaintiffs' efforts to recover in tort for injuries sustained in their capacity as employees.

The claim for breach of fiduciary duty rests on stronger ground insofar as it seeks recovery for injuries that plaintiffs allegedly sustained as minority shareholders, a capacity in which plaintiffs undoubtedly were owed fiduciary duties. In this regard, plaintiffs allege that ML's controlling shareholders forced them out of the Firm to prevent them from sharing in the financial benefits attendant to the planned wind down and liquidation.

While it might seem self-evident that controlling shareholders of a corporation may not enrich themselves personally by altering the terms and conditions of minority shareholders' employment to force a buy-out at a low price, that is not always the case. A cause of action for breach of fiduciary duty founded upon such allegations will not lie where: (1) the minority shareholders are at-will employees, and (2) the shares are subject to mandatory repurchase by the corporation upon the termination of employment.

That is the holding of *Gallagher v Lambert* (74 NY2d 562 [1989]), in which a divided Court of Appeals ruled that an employee/minority shareholder of a corporation had not stated a claim for breach of fiduciary duty through allegations of the "premature 'bad faith' termination of his at-will employment" where the "sole purpose" of the termination "was to acquire [the plaintiff's] stock at a contractually and temporally measured lower buy-back price formula" (*id.* at 566).

Although the claim purportedly rested on "an alleged departure from a fiduciary duty of fair dealing existing independently of the employment and arising from the plaintiff's simultaneous relationship as a minority shareholder," the *Gallagher* majority reasoned that such a claim "cannot be neatly divorced . . . from the employment because the buy-back provision links them together as to timing and consequence" (*id.* at 566-567). The majority further emphasized that mandatory buy-sell agreements "should not be undone simply upon an

allegation of unfairness. This would destroy their very purpose, which is to provide a certain formula by which to value stock in the future" (*id.*).

Writing for the dissent, former Chief Judge Kaye would have allowed the claim insofar as it was brought by plaintiff in his role as a minority shareholder, which the dissent found to be "conceptually unrelated to [plaintiff's] at-will employment status" (*id.* at 571). The dissent would not allow a corporation or its controlling shareholders to terminate the at-will employment of a minority shareholder "solely for [a] self-aggrandizing, opportunistic purpose" (*id.* at 574).

In light of the clear holding of *Gallagher*, the Court must conclude that plaintiffs have not stated a claim for breach of fiduciary duty, even assuming the truth of their allegations that the Firm's controlling shareholders forced plaintiffs out to prevent them from sharing in the distribution of ML's assets, including the $600,000 in federal PPP funds (*see* Complaint, ¶¶ 66, 73; Laurilliard Aff., ¶¶ 44-45; Pastore Aff., ¶¶ 4, 33).[7]

Each plaintiff "accepted the offer to become a minority stockholder [of ML], but only for the period during which he remained an employee. The buy-back price formula was designed for the benefit of both parties precisely so that they could know their respective rights on certain dates and avoid costly and lengthy litigation on the 'fair value' issue" (*Gallagher*, 74 NY2d at 567 [citation omitted]).

Allowing plaintiffs to maintain a breach of fiduciary duty claim on the facts alleged here "would open the door to litigation on both the value of the stock and the date of termination, and hinder the employer from fulfilling its contractual rights under the agreement. This would

[7] Defendants vigorously deny plaintiffs' allegations and offer, through their counsel, what they claim to be legitimate business justifications for their treatment of plaintiffs, including: Laurilliard (and possibly Pastore) having given notice of their intent to leave the Firm on April 10, 2020 (*see* Complaint, ¶ 41); the April 15, 2020 announcement made by plaintiffs' new law firm (*see* NYSCEF Doc No. 14); and, of course, the challenges faced by all New York employers in the early days of the COVID-19 outbreak.

frustrate the agreement and would be disruptive of the settled principles governing like agreements where parties contract between themselves in advance so that there may be reliance, predictability and definitiveness between themselves on such matters" (*id.*).

Accordingly, "[d]ocumentary evidence establishes that [ML's] termination of plaintiff[s'] employment and demand to buy back [their] shares was in accordance with the controlling provisions of the [Employment Agreements and Shareholder Agreements], and requires that the [claim for breach of fiduciary duty] be dismissed" (*D'Antonio v Hiller*, 41 AD3d 240, 240-241 [1st Dept 2007]; *see Gallagher*, 74 NY2d at 567; *Ingle*, 73 NY2d at 188-190).[8]

CONCLUSION

For all of the foregoing reasons,[9] it is

ORDERED that defendants' motion is granted, and plaintiffs' complaint is dismissed.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for defendants shall promptly serve notice of entry on all parties entitled thereto.

Dated: Albany, New York
June 29, 2023

RICHARD PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 9-23, 27-46, 49-57.

06/30/2023

[8] Defendants generally argue that plaintiffs' claims are foreclosed by their status as at-will employees of the Firm and the mandatory stock repurchase agreement, but neither side cited or discussed *Gallagher* or *Ingle*. Nonetheless, the legal sufficiency of plaintiffs' claim for breach of fiduciary duty presents a pure question of law for the Court.

[9] The parties' remaining arguments, to the extent not expressly addressed, have been considered and found to be either without merit or unnecessary to entertain given the disposition reached herein.