

MEMORANDUM

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: Honorable Leonard Livote IAS TERM, PART 33
Acting Supreme Court Justice

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EFRAT GAM and SLIM'S BAGLES & BIALYS, INC.,

Plaintiff,

Index No: 701298/17
Amended Order

-- against --

JOSEPH DVIR,

Defendants.

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FILED

9/25/2020
9:00 AM

COUNTY CLERK
QUEENS COUNTY

The Court conducted a trial on December 2, 2019, through December 5, 2019. The legal causes of action were tried before the jury and equitable actions were tried before the Court. Upon the evidence found to be credible, the Court renders the following Findings of Fact and Conclusions of Law.

Findings of Fact

In 1999, plaintiff Efrat Gam ("Gam") and defendant Joseph Dvir ("Dvir") formed plaintiff Slim's Bagles and Bialys, Inc. (Slim's"), a bagel store. Gam and Dvir each own 50% of the shares of Slim's. There is no shareholders agreement or operating agreement. Both Gam and Dvir are de facto directors of Slim's.

Initially, Gam ran the day to day operations. In 2007 Gam moved to Australia, later moved to Florida, and relinquished management to Dvir. Dvir initially took a salary and paid distributions to himself and Gam. However, due to a drop in business, the last distribution was in October of 2016. During the time he was solely managing the business, Dvir also wrote checks to himself in the amount of \$141,099.00.

On December 6, 2019, the jury awarded plaintiff Slim's \$141,099.00, on its derivative claim of unjust enrichment.

Conclusions of Law

The two equitable actions in the complaint remaining at the time of trial were the seventh cause of action for removal of Dvir as an officer pursuant to BCL § 716, and the eighth cause of action for attorney's fees pursuant to BCL § 626.

BCL § 716 states: "An action to procure a judgment removing an officer for cause may be brought by the attorney-general or by ten percent of the votes of the outstanding shares, whether or not entitled to vote. The court may bar from re-election or reappointment any officer so removed for a period fixed by the court."

As a threshold matter, Gam is the owner of more than ten percent of the outstanding shares. Furthermore, the jury verdict finding that Dvir unjustly enriched himself constitutes cause for removal. However, as the Court of Appeals has stated: "Unlike the typical shareholder in a publicly held corporation, who may be simply an investor or a speculator and cares nothing for the responsibilities of management, the shareholder in a close corporation is a co-owner of the business and wants the privileges and powers that go with ownership. His participation in that particular corporation is often his principal or sole source of income. As a matter of fact, providing employment for himself may have been the principal reason why he participated in organizing the corporation. He may or may not anticipate an ultimate profit from the sale of his interest, but he normally draws very little from the corporation as dividends. In his capacity as an officer or employee of the corporation, he looks to his salary for the principal return on his capital investment, because earnings of a close corporation, as is well known, are distributed in major part in salaries, bonuses and retirement benefits." (*Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 71 [1984]. Quoting, O'Neal, *Close Corporations* [2d ed.], § 1.07, at pp. 21-22 [n. omitted]).

In the instant case, removal of Dvir as an officer for cause will severely impact the value of his investment. However, it was Dvir's own actions that have resulted in this situation. Accordingly, the plaintiff has proven cause for Dvir to be removed and it is an appropriate remedy under the circumstances.

Plaintiffs also move for an award of attorney's fees. BCL § 626 states that: "[i]f the action on behalf of the corporation was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs or a claimant or claimants as the result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorney's fees, and shall direct him or them to account to the corporation for the remainder of the proceeds so received by him or them. This paragraph shall not apply to any judgment rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage sustained by them."

In the instant case, the action resulted in a judgment in

favor of the corporation. Accordingly, the plaintiffs are entitled to an award of attorney's fees. The parties have consented to the Court determining the award on submissions.


Plaintiffs seek an award of \$130,405.00 in legal fees and 2,955.09 in disbursements. Having reviewed the plaintiffs' application and the defendant's opposition, the request is reduced by \$1,775.00, which was incurred by opposing a motion to compel billing records which were improperly withheld by plaintiff and \$1,785.00, which was incurred opposing a contempt motion directed at a non-party.

Accordingly, defendant Joseph Dvir is removed as an officer of Slim's Bagles and Bialys, Inc., and plaintiff is awarded \$126,845.00 in legal fees and 2,955.09 in disbursements.

This constitutes the decision of the Court.

Settle Judgment.

Dated: September 24, 2020


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Leonard Divote, A.J.S.C.

FILED

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9:00 AM**

**COUNTY CLERK
QUEENS COUNTY**