

701298/17

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

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

Plaintiffs,

- against -

JOSEPH DVIR

Defendant.

NOTICE OF SETTLEMENT OF COUNTER JUDGMENT

**LAWRENCE F. SPIRN, Esq.
Attorney for Defendant
81 Scudder Avenue
Northport, NY 11768
631-651-9070**

Please Take Notice that the within Counter Judgment shall be presented to the Court/Clerk of the Court for consideration and entry on the 5th day of October, 2020 at 9:30 a.m. at the courthouse located at 88-11 Sutphin Boulevard, Jamaica, NY 11435.

**FILED & RECORDED
DEC 09 2020
COUNTY CLERK
QUEENS COUNTY**

FILED & RECORDED

DEC 09 2020

COUNTY CLERK
QUEENS COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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

Plaintiffs,

INDEX NO.: 701298-2017

-against-

COUNTER JUDGMENT

JOSEPH DVIR,

Defendant.

An action having been commenced by Plaintiff Efrat Gam. Individually and on behalf of the Corporate Plaintiff Slims Bagles & Bialys, Inc. ("Slims") against the Defendant arising out of certain transactions and incidents involving the operation of the business known as Slims Bagles & Bialys, Inc. in Little Neck, New York and this matter having been assigned to the Hon. Leonard Livote for all purposes; and

This matter having duly come on to be heard before the Hon. Leonard Livote at the courthouse located at 88-11 Sutphin Boulevard, Jamaica, NY for trial, with a jury, on December 2, 2019, and a trial having been conducted on December 2, December 3, December 4, December 5 and December 6, 2019, and the Plaintiffs having appeared, and the Plaintiffs' counsel, Richard L. Farley, Esq. of Farley & Kessler, P.C. having appeared, and the Defendant having appeared, and the Defendant's counsel, Lawrence Spirn, Esq., Jennifer Spirn, Esq., and Peter Creedon, Esq., having appeared and the testimony of witnesses having been taken, and evidence having been adduced, and the issues having been duly tried; and

Three causes of action having of the Plaintiffs' Supplemental complaint having been previously dismissed by this Court, including the Second Cause of Action for Breach of Fiduciary Duty (Individual), the Third Cause of Action for Breach of Fiduciary Duty (Derivative), and the Fifth Cause of Action for Conversion; and

The First Cause of Action - Unjust Enrichment having been duly submitted to the jury for consideration, and the remaining Causes of Action having been submitted to the Court for consideration, and the Plaintiffs having agreed prior to trial to voluntarily discontinue the Fourth Cause of Action - Injunction, and the Court having issued a

decision from the bench dismissing the Sixth Cause of Action - Accounting, and the Court having reserved Decision on the Seventh Cause of Action for Removal of Defendant as a Corporate Officer, and the Eighth Cause of Action - Award of Counsel Fees to Plaintiffs; and

The Jury and the Court having considered the evidence presented, and the Jury having rendered a Verdict on the 6th day of December, 2019, in favor of the Plaintiff Corporation against the Defendant on the First Cause of Action for Unjust Enrichment in total amount of \$141,099.00; and

The parties having submitted Post-Trial Memorandums with respect to the Seventh and Eighth Causes of Action on December 18, 2019, and this Court having rendered a Decision/Order after Trial on the 24th day of September, 2020, granting Plaintiffs' request to remove the Defendant as Corporate Officer pursuant to BCL §716, as sought by the Plaintiffs' Seventh Cause of Action, and awarding Plaintiffs counsel fees and disbursements in the amount of \$126,845.00 and \$2,955.09, respectively, to be paid by the Corporation, as sought by Plaintiffs' Eighth Cause of Action, pursuant to BCL §626 and the costs and disbursements of the Plaintiffs having been duly taxed by the Clerk of this Court in the sum of \$, as set forth by the annexed Bill of Costs,

NOW, on Motion of Lawrence F. Spirn, Esq., attorney for the Defendant, it is ORDERED, ADJUDGED and DECREED that Plaintiffs Fourth Cause of Action of the Complaint is withdrawn; and it is

ORDERED, ADJUDGED and DECREED that the Plaintiffs' Sixth Cause of Action of the Complaint is Dismissed; and it is

ORDERED, ADJUDGED and DECREED that the Corporate Plaintiff is awarded money judgment on the First Cause of Action of the Complaint in the sum of \$141,099.00 with legal interest from December 31, 2013, on the Plaintiffs' Unjust Enrichment Claim against Defendant Joseph Dvir; and it is

ORDERED, ADJUDGED and DECREED that the Defendant Joseph Dvir is hereby removed as a Corporate Officer of the Corporate Plaintiff pursuant to BCL §716; and it is

ORDERED, ADJUDGED and DECREED that the individual Plaintiff Efrat Gam is awarded Judgment on the Eighth Cause of Action for legal fees and disbursements incurred in the prosecution of this case on behalf of the Corporate Plaintiff in the amounts of \$126,845.00 and \$2,955.09 respectively, to be paid from the account of the Corporate Plaintiff; and it is

ORDERED, ADJUDGED and DECREED that the Plaintiff, Slims Bagles and Bialys, Inc., whose principal place of business is located at 254-31 Horace Harding Boulevard, Little Neck, NY 11362, a domestic corporation, recover against Defendant Joseph Dvir, an individual residing at 630 First Avenue, Apt. 12 D, New York City, NY 10012, on the First Cause of Action of the Complaint, the sum of \$141,099.00, with legal interest at 9% per annum, from December 31, 2013, in the amount of \$ 88,196.54, together with costs and disbursements as taxed in the amount of \$ 1,750.⁰², making in all the sum of \$ 231,045.54, and that the Plaintiff have execution therefore; and it is further

DOCKET

ORDERED, ADJUDGED and DECREED that the Plaintiff Efrat Gam, residing at 334 Chinook Circle, Lake Mary, Florida 32746, is hereby awarded money judgment against Corporate Plaintiff, Slim's Bagles and Bialys, Inc., a domestic corporation whose principal place of business is located at 254-31 Horace Harding Boulevard, Little Neck, NY 11362, on the Eighth Cause of Action of the Complaint, in the amounts of \$126,845.00 and \$2,955.09, respectively, and that the Plaintiff Efrat Gam have execution therefore.

DOCKET

Judgment entered this 7th day of ~~October~~ ^{December}, 2020.

[Signature]
A Justice, Supreme Court
HON. LEONARD LIVOTE

[Signature]
CLERK

ENTERED
11:50 AM/PM
DEC 09 2020
COUNTY CLERK
COUNTY OF QUEENS

FILED & RECORDED
DEC 09 2020
COUNTY CLERK
QUEENS COUNTY

3

SUPREME COURT
COUNTY OF QUEENS

Index No. 2017-701298

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

Plaintiff(s)

against

Costs of Plaintiff

JOSEPH DVIR

Defendant(s)

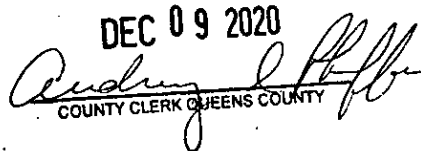
COSTS

Costs before note of issue CPLR §8201 subd. 1	\$ 200 00	Fee for index number CPLR §8018(a)	\$ 210 00
Costs after note of issue CPLR §8201 subd. 2	200 00	Referee's fees CPLR §8301(a)(1), 8003(a)	
Trial of issue CPLR §8201 subd. 3	300 00	Commissioner's compensation CPLR §8301(a)(2)	
Allowance by statute CPLR §8302(a), (b)		Clerk's fee, filing notice of pend. or attach. CPLR §8021(a)(10)	25 00
Additional allowance CPLR §8302 (d)		Entering and docketing judgment CPLR §8301(a)(7), 8016(a)(2)	
Motion costs CPLR §8202		Paid for searches CPLR §8301(a)(10)	
Appeal to Appellate Term CPLR §8203 (b)		Affidavits & acknowledgments CPLR §8009	
Appeal to Appellate Division CPLR §8203 (a)		Serving copy summons & complaint CPLR §8011(h)(1), 8301(d)	40 00
Appeal to Court of Appeals CPLR §8204		Request for judicial intervention	95 00
Costs upon frivolous claims and counterclaims CPLR §8303-a		Note of issue CPLR §8020(a)	95 00
		Paid referee's report CPLR §8301(a)(12)	
		Certified copies of papers CPLR §8301(a)(4)	
		Satisfaction piece CPLR §5020(a), 8021	
		Transcripts and filing CPLR §8021	
		Certified copy of judgment CPLR §8021	
		Postage CPLR §8301(a)(12)	
		Jury fee CPLR §8020(c)	
		Stenographers' fees CPLR §8002, 8301	
		Sheriff's fees on execution CPLR §8011, 8012	
		Sheriff's fees, attachment, arrest, etc. CPLR §8011	
		Paid printing cases CPLR §8301(a)(6)	
		Clerk's fees Court of Appeals CPLR §8301(a)(12)	
		Paid copies of papers CPLR §8016(a)(4)	270 00
		Mouth expenses CPLR §8301(b) (6)	
		Fees for publication CPLR §8301(a)(3)	
		Serving subpoena CPLR §8011(h)1, 8301(d)	
		Paid for Search CPLR §8301(a)(10)	
		Notice of Appeal	65 00
		Referee's report	
		Attendance of witnesses CPLR §8001(a)(b)(c), 8301(a)(1)...	
		EBT Transcript 8301(a)	250 00
		Diamond Reporting	
Costs	\$ 700		
DISBURSEMENTS	1050		
TOTAL	1750		\$ 1050

DISBURSEMENTS

WITHIN COSTS TAXED WITHOUT NOTICE
AT \$ 1750.00

DEC 09 2020


COUNTY CLERK QUEENS COUNTY

NYSCEF DOC. NO. 458

State of New York, County of ss:

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at

That on deponent served the within bill of costs and notice of taxation on

attorney(s) for herein, at his/her office at

during his/her absence from said office strike out either (a) or (b)

(a) by then and there leaving a true copy of the same with

his/her clerk; partner; person having charge of said office.

(b) and said office being closed, by depositing a true copy of same, enclosed in a sealed wrapper directed to said attorney(s), in the office letter drop or box.

Sworn to before me on

State of New York, County of ss:

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at

on deponent served the within bill of costs and notice of taxation on

attorney(s) for at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within New York State.

Sworn to before me on

Index No. 2017-701298

SUPREME COURT

COUNTY OF NASSAU

Efrat Gam and Slim's Bagles & Bialys, Inc.

Plaintiff(s)

against

Joseph Dvir

Defendant(s)

**Bill of Costs
and Notice of Taxation**

Please Take Notice that the within is a true copy of the items of costs and disbursements in the within action taxed* and that the same will be taxed*

by the Clerk of Court, at his/her office in the courthouse thereof on at M. of that day—and the amount inserted in the judgment.

Yours, etc.

Farley & Kessler, P.C.
Attorney(s) for Plaintiffs

55 Jericho Tpke, Ste 204
Jericho, New York 11753

To

Attorney(s) for

Service of the within bill of costs and notice of taxation is hereby admitted on

Attorney(s) for

* Strike out one (CELR 8402, 8403)

Dated: September 22, 2020

Richard L. Farley
The undersigned and the undersigned herein

The undersigned, an attorney admitted to practice in the courts of this state, affirms: that I am the attorney(s) of record for the Plaintiff(s) in the above entitled action; that the foregoing disbursements have been or will necessarily be made or incurred in this action and are reasonable in amount and that each of the persons named as witnesses attended as such witnesses on the trial, hearing or examination before trial herein the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names from the place of said trial, hearing or examination; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite their names in traveling to, and the same distance in returning from, the same place of trial, hearing or examination; and that copies of documents or papers as charged herein were actually and necessarily obtained for use. The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

STATE OF NEW YORK, COUNTY OF NASSAU

ss.

ATTORNEY'S AFFIRMATION

MEMORANDUM

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

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

Plaintiff,

Index No: 701298/17
 Amended Order

-- against --

JOSEPH DVIR,

Defendants.

-----X

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


.....
Leonard Divote, A.J.S.C.

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

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

Plaintiffs,

- against -

JOSEPH DVIR

Defendant.

NOTICE OF SETTLEMENT OF COUNTER JUDGMENT

LAWRENCE F. SPIRN, ESQ.
Attorney(s) for
DEFENDANT

FILED & RECORDED
DEC 09 2020
CO. Y CLERK
QUEENS COUNTY

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: 9/30/2020

Signature *Lawrence F. Spirn*

Print Signer's Name LAWRENCE F. SPIRN, ESQ.

Service of a copy of the within *is hereby admitted.*

Dated: _____
Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

NOTICE OF ENTRY that the within is a (certified) true copy of a _____ 20
entered in the office of the clerk of the within-named Court on

NOTICE OF SETTLEMENT that an Order of which the within is a true copy will be presented for settlement to the
Hon. _____, one of the judges of the within-named Court,
at _____, at _____ M.
on _____ 20 _____

Dated: _____

Attorney(s) for

LAWRENCE F. SPIRN
Counsellor At Law
81 Scudder Avenue
Northport, NY 11768

To: _____

TEL. (631) 651-9070
FAX (631) 651-9099