

NEW YORK SUPREME COURT, COUNTY OF NIAGARA
INDEX NO.: E177079/2022

To be Argued by:
MATTHEW J. BIRD, ESQ.
Time Requested: 10 Minutes

**New York Supreme Court
Appellate Division - Fourth Department**



JASON BURNS,
Individually and Derivatively on Behalf of
C.R.B. HOLDINGS, INC.

Plaintiffs/Appellants

DOCKET NO.: CA 23-00750

v.

C.R.B. HOLDINGS, INC., ROBERT BURNS

Defendants/Respondents

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

MATTHEW J. BIRD, ESQ.

Law Offices of John P. Bartolomei & Associates
*Attorneys for Plaintiffs/Appellants, Jason Burns,
Individually and Derivatively on Behalf of C.R.B.
Holdings, Inc.*

335 Buffalo Avenue

Niagara Falls, NY 14303

716-282-2774

matt@jpbartolomei.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	01
POINT I. APPELLANT HAD STANDING TO BRING A DERIVATIVE ACTION.....	01
POINT II. APPELLANT ASSERTED VALID AND TIMELY CAUSES OF ACTION THAT WERE NOT DISPUTED BY THE DOCUMENTARY EVIDENCE.....	04
A. Appellant stated a cause of action for Declaratory Judgement declaring the closing date for the Shares Null and Void (First cause of action)...	04
B. Appellant stated a cause of action for Fraudulent Transfer of Shares, Assets, and Profits of Respondent CRB for own personal use (Third cause of action) and Fraud (Eighth cause of action).....	05
C. Appellant stated a cause of action for Breach of Contract (Fourth cause of action).....	07
D. Appellant stated a cause of action for Breach of Fiduciary Duty (Fifth cause of action).....	10
E. Plaintiff stated a cause of action for Conversion (Sixth cause of action).....	11
F. Appellant stated a cause of action for Unjust Enrichment (Seventh cause of action).....	12
CONCLUSION	13
PRINTING SPECIFICATIONS STATEMENT	14

TABLE OF AUTHORITIES

CASES:

<i>ADC Orange, Inc. v. Coyote Acres, Inc.</i> , 7 N.Y.3d 484, 489, 824 N.Y.S.2d 192, 857 N.E.2d 513 (2006).....	9
<i>AMF, Inc. v Algo Distribs., Ltd.</i> , 48 AD2d 352, 356-357 (2d Dept. 1975).....	12
<i>Anesthesia Assoc. of Mount Kisco, LLP v N. Westchester Hosp. Ctr.</i> , 59 AD3d 481, 482 (2d Dept 2009).....	5
<i>Bernstein v Polo Fashions, Inc.</i> , 55 AD2d 530, 530-531 (1st Dept 1976).....	3
<i>Center v Hampton Affiliates, Inc.</i> , 66 NY2d 782, 785 (Court of Appeals 1985).....	2
<i>Feldmann v Scepter Group, Pte. Ltd.</i> , 185 AD3d 449, 450 (1st Dept 2020).....	8
<i>Lamberti v. Angiolillo</i> , 73 A.D.3d 463 (2010).....	8
<i>Lemle v Lemle</i> , 92 AD3d 494, 497 (1st Dept. 2012).....	12
<i>Morrow v. MetLife Invs. Ins. Co.</i> , 177 A.D.3d 1288, 1289, 113 N.Y.S.3d 421 (2019).....	11
<i>MT Property, Inc. v. Weinstein</i> , 50 AD3d 751, 855 N.Y.S.2d 627 (2d Dep’t 2008).....	12
<i>Sajust, LLC v. Mendelow</i> , 198 A.D.3d 582 (1st Dept 2021).....	10

PRELIMINARY STATEMENT

This is a reply in further support by Plaintiff-Appellant, Jason Burns from the part of the Decision and Order of the Honorable Timothy J. Walker, Acting Supreme Court Justice (“Lower Court”), dated April 4, 2023 and filed and entered in the office of the Niagara County Clerk on April 6, 2023, that granted Defendants-Respondents’ Motion to dismiss the Amended Complaint. (Record 38-53).

POINT I. **APPELLANT HAD STANDING TO BRING A DERIVATIVE ACTION**

Respondents argue that Appellant’s own allegations aver that Respondent CRB exercised its option to purchase Appellant’s fifteen shares upon the termination of his employment pursuant to Section 3.4 of the 2014 Shareholders Agreement on November 6, 2020. (Record, p. 40). Furthermore, Respondents argue that the sale of Appellant’s shares closed on June 25, 2021 (“Closing”) (Record, p. 40). As a result, Respondents argue that by his own allegations, Appellant lacked standing to bring a shareholder’s derivative suit.

The allegations found in the Amended Complaint in no way admit that the purchase of the shares closed on June 25, 2021. The complete opposite is alleged, which is detailed throughout the Amended Complaint and Appellant’s initial brief on appeal. Notably, the allegations surrounding the sale are set forth purportedly. There is a present dispute as to the shareholder status, which forms the basis of this action.

In the Decision and Order (Record, p. 40), the Lower Court references Docket No 40, Paragraph 87, which provides as follows:

On June 25, 2021, CRB purportedly proceeded with the sale of the purchased shares from Plaintiff under the terms of the Shareholders Agreement. CRB purports to have delivered Plaintiff a certified check for Fifty-Six Thousand Two Hundred Fifty Dollars (\$56,250) and a Promissory Note for One Hundred Sixty Eight Thousand Seven Hundred Fifty Dollars (\$168,750).

On a pre-answer motion to dismiss, the Lower Court could not have made a factual determination as to whether there was a closing, especially when the Amended Complaint specifically alleged otherwise.

Respondents also argue that Appellant has cited no case where a former shareholder, or even a shareholder contesting the valid purchase of his shares, mounted a shareholder's derivative lawsuit.

Center v Hampton Affiliates, Inc., 66 NY2d 782, 785 (Court of Appeals 1985), addressed a similar issue and held that if the plaintiff was ultimately successful in his action regarding an agreement to transfer stock, he may be entitled to maintain his shareholder's derivative causes of action. The Court of Appeals held that "defendants' contention that plaintiff lacks standing to maintain his derivative causes of action on behalf of the corporation cannot be conclusively determined at this time." Furthermore, "Inasmuch as plaintiff's right to maintain a shareholder's derivative action depends upon his success on his individual causes of action, the

derivative claims should be severed and held pending disposition of plaintiff's individual claims." Id. at 782, 786. Similarly, *Bernstein v Polo Fashions, Inc.*, 55 AD2d 530, 530-531 (1st Dept 1976) held that

"the right to maintain a stockholder's derivative action depends, therefore, upon the outcome of the third cause of action for there it is alleged [defendants] perpetrated a fraud on him in the preparation of a stock purchase agreement which differed from an earlier option agreement in that it required plaintiff sell his shares []and the corporation whether he be discharged with or without cause. Reformation of the stock purchase agreement to have it conform with the option agreement or rescission of the stock purchase agreement is the relief sought. Should he succeed he will possess an equitable interest in [the] stock and have the right to institute a stockholder's derivative action. Thus, at this juncture he does not lack standing as a matter of law."

Next, Respondents argue that the Lower Court held that dismissal of all derivative claims was also independently justified by Appellant's failure to make a pre-litigation demand upon the board to prosecute the lawsuit.

Appellant's allegations are not merely conclusory allegations of wrongdoing, and is the exact situation for which the exception to the demand applies. A demand on Respondent Burns to commence this action for his own alleged misdeeds would be ineffective and incapable of producing any result. Appellant has alleged that: Respondent Burns is the Chief Executive Officer of CRB, and has exhibited complete control over the corporation (Record, p. 57, Paragraph 13); Respondent Burns owns 85 shares and Plaintiff owns 15 shares (Record, p. 57, Paragraph 18);

Respondent Burns has knowingly engaged in activities which have been detrimental to the welfare and business of CRB. Respondent Burns' activities have been perpetrated to disrupt the business of the CRB for his own benefit. (Record, p. 77-79, Paragraph 94 a-1 which detail the specific acts); Respondent Burns has declared shares transferred so that he is the sole shareholder, without following any of the deadlines or requirements (Record, p. 74-76, Paragraphs 78-86); and Appellant has demanded a formal accounting that was not complied with (Record, p. 79, Paragraph 97).

POINT II.
APPELLANT ASSERTED VALID AND TIMELY CAUSES OF
ACTION THAT WERE NOT DISPUTED BY THE DOCUMENTARY
EVIDENCE

A. Appellant stated a cause of action for Declaratory Judgement declaring the closing date for the Shares Null and Void (First cause of action)

Respondents argues that the Lower Court correctly dismissed Appellant's First Cause of Action for Declaratory Judgment declaring the Closing of the shares null and void. Specifically, that the Lower Court noted that Appellant alleges that the notice and other time periods set out in Sections 3.4 and 3.5 of the 2014 Shareholders Agreement were violated, which is the same basis for the Appellant's breach of contract claim. Furthermore, Respondents argue that the relief sought is monetary, not declaratory, which belies the claim for declaratory relief.

A declaratory judgment cause of action is proper where monetary damages would not provide the complete relief sought in the cause of action. (See *Anesthesia Assoc. of Mount Kisco, LLP v N. Westchester Hosp. Ctr.*, 59 AD3d 481, 482 (2d Dept 2009)). Here, the declaratory judgment not only seeks monetary relief, but it seeks rescission and a declaration that the purported closing for the purported sale of the shares is void. Appellant seeks a declaration that he is still a shareholder. This cause of action shouldn't have been dismissed as duplicative of the breach of contract cause of action or because monetary relief is being requested. A cause of action was properly stated, irrespective of damages that may flow from Appellant's ownership of shares. The allegations, when accepted as true, present a controversy as to who presently owns the shares.

B. Appellant stated a cause of action for Fraudulent Transfer of Shares, Assets, and Profits of Respondent CRB for own personal use (Third cause of action) and Fraud (Eighth cause of action)

Respondents argue that the Third and Eighth Causes of Action are improperly pled. Specifically, that Appellant fails to identify a single material misrepresentation of fact that constitutes fraud in connection with the 2014 Shareholders Agreement. Furthermore, Respondents argue that with respect to the other alleged fraudulent "activities" in paragraph 184 of the Amended Complaint, it is hard to discern what constitutes a misrepresentation, or when they occurred because it omits any

particulars, including times, dates, and the like, all of which are required for proper pleading.

Contrary to Respondents' argument, Appellant has provided the basis of his fraud claims and set forth specific facts that support his claim with known dates. The following allegations against Respondent Burns are specific and support the fraud based causes of action:

- a. acting in his own best interest rather than in the best interest of CRB and Plaintiff.
- b. beginning in 2017 when Plaintiff became a minority shareholder and continuing to this day, Defendant used CRB to funnel money for his own personal gain, by paying himself dividends, and not paying dividends to Plaintiff for his Fifteen (15%) Percent ownership.
- c. in 2016, Defendant Burns' increased his salary from approximately \$2,000.00 per week to approximately \$7,000.00 per week.
- d. using CRB funds to purchase personal items such as vehicles and real property, without compensating Plaintiff for his Fifteen (15%) Percent ownership.
- e. on or around December 21, 2018, he purchased a house in Fort Myers, Florida, for approximately \$605,000, with CRB funds.
- f. on or around January 19, 2022, he purchased 4501 Hyde Park Blvd., in Niagara Falls, New York, with CRB funds.
- g. in 2021 he purchased an Escalade with CRB funds.
- h. in 2022 he purchased a pickup truck with CRB funds.

- i. beginning in 2017 when Plaintiff became a minority shareholder and continuing to this day, Defendant Burns underpaid Plaintiff, while indicating on Plaintiff's W-2 that he earned approximately \$150,000.00 per year. Plaintiff never received the full amount that was indicated on his W-2.
- j. exercising control over Plaintiff's shares without a closing taking place.
- k. not closing a deal with Kelton Enterprises, LLC (pursuant to a January 3, 2020 Letter of Intent) to sell the assets of CRB for a purchase price believed to be approximately \$5,000,000, when Defendants now claim CRB is valued at \$1,500,000.
- l. not compensating Plaintiff for approximately \$18,000 for funds received from Artpark for concession sales from 2008-2020.

(Record, p. 78-79).

C. Appellant stated a cause of action for Breach of Contract (Fourth cause of action)

Respondents argues that the Lower Court dismissed Appellant's claim for breach of contract on four independent grounds: failure to allege a material breach, immateriality, waiver, and, even if a material breach occurred, a lack of damages. (Record, pp. 45, 46). Respondents primarily argue that the closing date for a purported sale is not a material provision. However, this ignores the allegations of the Amended Complaint because it is not merely the closing date, but the manner in which there could be a transfer of shares and how the purchase price was arrived at.

Respondents cite *Feldmann v Scepter Group, Pte. Ltd.*, 185 AD3d 449, 450 (1st Dept 2020), which actually supports Appellant's argument in holding that "A material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract." Appellant has alleged a material breach under the contract (Record 64- 66, 75-76). The Lower Court erred in holding that these were not material provisions, and in doing so, ignore that the most material provision surrounds Appellant's shareholder status and the procedure for any possible sale. These were in fact material provisions, when the entirety of the agreement deal with the process by which shares could be transferred. Reference is made to Record p. 127, which addresses the purpose of the agreement. The formalities could not have been ignored, and because they were, Respondent Burns is in breach of the contract. In addition, Appellant also stated a breach of contract with respect to the actions of Respondent Burns using corporate assets for his own personal benefit. Reference is made to the Record p. 77-79, which detail the specific allegations.

Respondents' reliance on *Lamberti v. Angiolillo*, 73 A.D.3d 463 (2010) is misplaced. Unlike the defendant in *Lamberti*, Appellant did not waive his right to strict compliance with the contract terms either expressly or by his conduct. Appellant has repeatedly stated that he is still a shareholder and that the purported closing did not, and could not occur because material provisions were not followed.

The detailed history of Appellant's objection to the purported sale and Respondents' failure to follow the contract is set forth in paragraphs 78-92 of the Amended Complaint (Record, p. 74-77).

Respondents also cite *ADC Orange, Inc. v. Coyote Acres, Inc.*, 7 N.Y.3d 484, 489, 824 N.Y.S.2d 192, 857 N.E.2d 513 (2006) to argue that a closing date is not a material provision. It is not simply the closing date that Appellant alleges was breached, it was the material provisions of arriving at a potential sale. None of the dates have been invoked or complied with and though Appellant dismisses the Shareholders Agreement as a whole, the dates serve to extinguish any option to purchase Respondent Burns or the corporation may have ever had even if the Shareholders Agreement were to somehow be considered valid and enforceable.

With respect to damages, Appellant alleges throughout that he has been damaged due to the breach of contract. Specifically, the damages are the corporate shares that were purportedly transferred to Respondent Burns and profits that Respondent Burns used for his own benefit. By no longer being a shareholder as advanced by Respondents, Appellant is damaged because he no longer has that asset or profits from the corporation. In addition, Appellant has been damaged by the use of corporate assets for Respondent Burns' own personal use while a shareholder.

D. Appellant stated a cause of action for Breach of Fiduciary Duty (Fifth cause of action)

Respondents argue that the Lower Court dismissed this claim on several independent grounds, including that the claim is (1) derivative in nature and (2) subsumed by the breach of contract claim, since the 2014 Shareholders Agreement governs the internal affairs of the Corporation.

Appellant states a cause of action for breach of fiduciary duty, by alleging a fiduciary relationship, Respondent Burns' misconduct, and damages directly caused by the misconduct. As was set forth in the initial brief, reference is made to paragraphs 150-154 of the Amended Complaint. (Record p. 90-92). The Lower Court incorrectly found that this cause of action was derivative in nature. However, it is a breach to the rights of the individual shareholder as well as to the corporation. Appellant has standing to bring a derivative action and also protect his individual rights as a shareholder.

Respondents rely on *Sajust, LLC v. Mendelow*, 198 A.D.3d 582 (1st Dept 2021), cited by the Lower Court, to argue that the claims are derivative in nature. As is set forth previously, Appellant has standing to bring a derivative claim, and it should not be determined on a pre-answer motion to dismiss where he also seeks a declaration as to his rights as a shareholder. Regardless, the case does not warrant dismissal. In *Sajust*, the Plaintiff alleged that the value of his shares were diminished, to which the Court determined was a derivative claim. Here, Appellant argues harm

to the corporation, but also individual harm based on Respondent Burns' self-dealing, among other things.

E. Plaintiff stated a cause of action for Conversion (Sixth cause of action)

Respondents argue that the Lower Court held that Appellant failed to “identify any assets, funds, or shares with particularity, which he is required to do.” (Record, p. 47-48). Respondents further argue that paragraphs 159-165 of the Amended Complaint (Record, p. 93- 94) only provide a generic list of grievances and does not satisfy the requirements for asserting a conversion claim because that claim requires allegations of a possessory interest and identifiable property and specifically identifiable funds.

Respondents cite *Morrow v. MetLife Invs. Ins. Co.*, 177 A.D.3d 1288, 1289, 113 N.Y.S.3d 421 (2019) to argue that there cannot be a conversion because he did not have a possessory interest in the fifteen shares. In that case, the Court held that “Plaintiff failed to state a cause of action for conversion inasmuch as the conduct alleged to have been committed by defendant did not show that defendant assumed or exercised control over personal property belonging to plaintiff.” *Id.* Here, there are specific allegations that Respondent Burns exercised control over not only the shares, but profits and other corporate assets in which Appellant had a possessory interest in as a shareholder.

Appellants have stated a conversion claim under the standard set forth in *AMF, Inc. v Algo Distribs., Ltd.*, 48 AD2d 352, 356-357 (2d Dept. 1975) and *Lemle v Lemle*, 92 AD3d 494, 497 (1st Dept. 2012), cited in Appellant's initial brief. Appellant has alleged legal ownership or a right of possession to a specific identifiable thing, and that the Respondents exercised unauthorized dominion over the thing in question, to the exclusion of the Appellant's rights.

F. Appellant stated a cause of action for Unjust Enrichment (Seventh cause of action)

Respondents argue that the Lower Court dismissed Appellant's unjust enrichment claim because it is a rehash of the fraud and breach of contract claims and that there is a written agreement which prohibits a separate unjust enrichment claim. (Record, p. 48-49).

Respondents cite *MT Property, Inc. v Weinstein*, 50 AD3d 751, 855 N.Y.S.2d 627 (2d Dep't 2008) to argue that there are no allegations that Appellant conferred a benefit upon Respondents, and that the Respondents will obtain that benefit without adequately compensating the Appellant therefor. *Mt Property* is distinguishable because it dealt with a written option agreement between the parties which expressly provided that the plaintiffs, as tenants, would undertake rezoning of the subject property at their "sole cost and expense." Thus, the Court held that plaintiffs could have no expectation of compensation for the costs and expenses they incurred to rezone and develop the property. Here, Appellant has alleged that both Respondent

CRB and Appellant were injured by Respondent Burns diverting assets, profits and shares of the corporation away from the corporation, and that Respondent Burns was unjustly enriched as a result. There was a clear expectation that Appellant would be adequately compensated as a fifteen percent shareholder of the corporation, and would also receive what was owed throughout the time he was a shareholder..

The Amended Complaint alleges in paragraphs 170-176, the facts demonstrating the unjust enrichment at Appellant's expense. (Record, p. 95-98). These allegations are separate and distinct from the fraud and breach of contract claims and properly set forth.

CONCLUSION

For all of the reasons set forth herein and in Appellant's initial brief, it is respectfully requested that this Court reverse the Decision and Order of the Lower Court.

Dated: February 15, 2024
Niagara Falls, New York



MATTHEW J. BIRD, ESQ.
LAW OFFICES OF JOHN P. BARTOLOMEI &
ASSOCIATES
Attorneys for Plaintiff/Appellant
Jason Burns
335 Buffalo Avenue
Niagara Falls, New York 14303
(716) 282-2774

PRINTING SPECIFICATIONS STATEMENT
Pursuant to 22 NYCRR § 1250.8(j)

The foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 2,952.

Dated: February 15, 2024