

DECISION AND ORDER

FILED & ENTERED
8/11/10

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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ROBERT ARMENTANO, individually, and on behalf
of PARACO GAS CORPORATION and all other
shareholders similarly situated,

Plaintiffs,

MOTION DATE: 7/23/10
INDEX NO.: 13313/10

-against-

PARACO GAS CORPORATION, JOSEPH ARMENTANO and
JOHN ARMENTANO,

Defendants.

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The following papers numbered 1 to 8 were read on this motion by defendants for an Order pursuant to CPLR 3211, subdivision (a), paragraph 7, dismissing the complaint.

Papers Numbered

Notice of Motion - Affirmation (Cohen) - Memorandum of Law -
Exh. 1 - 4
Answering Affirmation (Janelle) - Memorandum of Law - Exh. . 5 - 7
Replying Memorandum of Law 8

Upon the foregoing papers, it is Ordered and adjudged that this motion by defendants for an Order pursuant to CPLR 3211,

subdivision (a), paragraph 7, dismissing the complaint is disposed of as follows:

Defendant Paraco Gas Corporation ("Paraco") is a family owned business dealing in propane distribution wherein defendant Joseph Armentano is its Chief Executive Officer and a full time employee and shareholder,¹ and his brother defendant John Armentano is Paraco's Vice President, as well as a full time employee and a shareholder. Plaintiff Robert Armentano is defendant's Armentano's brother and a minority, non-voting shareholder in Paraco.² Up until the time of his death in February, 2010, the parties' father, Pat Armentano had been the only other director and officer of Paraco.

Plaintiff has commenced this action challenging Paraco's Board's passing of resolutions in 2006 and 2008 of two Employment and Annual Stock Bonus Compensation Plans (collectively referred to hereinafter as "Employment Agreements"). Specifically, it is alleged that on or about August 1, 2006, the Class A voting shareholders of Paraco, then being Pat and Joseph, had executed an

¹Defendant Joseph Armentano has been President of Paraco since approximately 1991.

²It is alleged that currently there are 101 shares of Paraco issued; 10 Class A voting shares and 91 Class B non-voting shares. As of July 31, 2009, plaintiff alleges that there were 2 Class A voting shares and 9 Class B non-voting shares held in Paraco's treasury.

Employment and Annual Stock Bonus Compensation plan to Joseph, backdated effective to August 1, 2005, pursuant to which Joseph had been issued four shares,³ and that, on or about August 1, 2008, the Class A voting shareholders of Paraco, then still being Pat Armentano and Joseph Armentano, executed an Employment and Annual Stock Bonus Compensation Agreement to John Armentano, pursuant to which John had been issued one share of stock.⁴ Plaintiff alleges that pursuant to these Employment Agreements, additional shares of Paraco will continue to be issued to defendants Joseph and John Armentano from Paraco's treasury. Based upon the foregoing, plaintiff, contending that the value of his shares of stock have been and will continue to be diluted by defendants' actions, has asserted four causes of action alleging that defendants have been unjustly enriched as a result of their self-dealing, misuse of position, breach of trust and breach of fiduciary duty.

Presently, defendants are moving to dismiss the complaint, arguing that plaintiff has failed to properly set forth as is required, particular factual allegations supporting the claims and certain necessary elements of such causes of action, and that all

³Plaintiff alleges that this Employment Agreement had been kept concealed from plaintiff until the next annual meeting held on March 26, 2007.

⁴Plaintiff alleges that this Employment Agreement had been kept concealed from plaintiff until plaintiff requested a book and records inspection conducted in 2009.

of the claims are defeated by the business judgment rule. Defendants argue that plaintiff fatally has failed to plead, and that he cannot plead, that he had paid money or any other consideration for his 16 shares of non-voting Class B stock, that defendants had acted in violation of the corporation's Charter and/or Business Corporation Law, and that the corporation is insolvent or has become insolvent as a result of defendants' actions. To the contrary, defendants argue that the Employment Agreement represent additional compensation for defendants' work and efforts which have directly resulted in Paraco's enormous growth and increase in value over the past twenty years. Further, contrary to plaintiff's claim, defendants argue that plaintiff cannot plead that the value of their stock has been diminished since Paraco did not newly issue any stock but instead merely had put ownership of stock shares which previously had been issued and were being held by the corporation's treasury into defendants' names.

In opposition to the dispositive motion, plaintiff characterizes defendants' actions as a classic case of self-dealing and breach of fiduciary duty" in that the Board of Directors is currently comprised solely of the named individual defendants who had voted to benefit themselves through the issuance of stock to the detriment of the minority shareholders. . Further, plaintiff

contends that no business justification has been provided or exists for compensating defendants with stock to the detriment and dilution of the minority shareholder.

It is well settled that majority shareholders and directors of closely held corporations stand in a fiduciary relationship with the corporation and the minority shareholders and are required to exercise the utmost good faith. See *Alpert v. 28 Williams Street Corp.*, 63 N.Y.2d 557, 568 (1984). Controlling majority shareholders may not use their control of the corporation to benefit themselves to the detriment of the corporation. See *Benhuri v. Cooper*, 2007 WL 2175596 (Sup. Ct. N.Y. Co. 2007).

Upon the Court's review of plaintiff's complaint which is limited to the two Employment Agreements in issue and consideration of the record at bar and application of the foregoing law, the Court grants defendants' dismissal motion as it cannot find that plaintiff properly has pleaded, nor that he can plead, that defendants' actions had resulted in defendants' failure to have provided good and prudent management and that defendants' Board actions had been contrary to the welfare, advantage and best interests of the corporation and its shareholders as a whole. See *Alpert v. 28 Williams Street Corp.*, supra at 572. Compensation of corporate officers is a matter within the purview of the board of directors, see Business Corporation Law Section 202(a)(10), and


will not be interfered with by a court in the absence of "a factual showing of misconduct amounting to bad faith." See Schwartz v. Rosenthal, 10 Misc. 85, 86 (Sup. Ct. N.Y. Co. 1958), citing Kalmanash v. Smith, 291 N.Y. 142 (1943). The inescapable fact is that, while a Board's actions which in fact comport with statutory requirements are still subject to the "limitation that such conduct may not be for the aggrandizement or undue advantage of the fiduciary to the exclusion or the detriment of the stockholders," id. at 569, here there is no allegation that as a consequence of defendants' actions there has been a disturbance in the control of the corporation or in the quality of plaintiff's shares. Defendants' challenged actions did not result in any capital authorization, nor an increase in the number of outstanding shares of Paraco, and they did not dilute the number of shares held by plaintiff, which remain the same both in number and percentage of stock ownership. While plaintiff alleges that there has been a diminution in the value of plaintiff's shares, such is stated in wholly conclusory fashion and simply is belied by the unrefuted facts prevailing.

Accordingly, on this record which establishes that the Board had the authority to enter into the subject Employment Agreements and that same properly had been approved by corporate resolution, the Court must find that the Board's entering into the two

Employment Agreements falls within its business judgment, to which this Court must defer. See Auerbach v. Bennett, 47 N.Y.2d 619, 629 (1979).

This action is hereby dismissed.

Dated: August 11, 2010
White Plains, New York



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J.S.C.

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