

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

Index No. 603384/06

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SANFORD B. MIOT,

Plaintiff,

-against-

HARRIET MIOT, in her individual capacity
and as an officer of Madcat Realty Corp.,
and ARNOLD MIOT, in his individual
capacity and as an officer of Madcat
Realty Corp.,

Defendants.
-----x

DEFENDANTS' POST-TRIAL BRIEF

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PRELIMINARY STATEMENT

By this action, Plaintiff Sanford Miot ("Plaintiff") is seeking a portion of the proceeds of the sale of real property known as and located at 400A East 118th Street, Manhattan ("Manhattan property"). Essential to determining if Plaintiff is entitled to any of the proceeds of the sale of the Manhattan property is an examination of the history of two corporations known by the same name, i.e., "Madcat Realty Corp." and the parcels of real estate owned by the "Madcat" corporations. The first corporation was formed in the 1970s and will be referred to herein as "Madcat70". Madcat70 owned a piece of real property in Brooklyn, New York ("Brooklyn property"). The second corporation was formed in February 1986 and will be referred to herein as "Madcat86". Madcat86 purchased the Manhattan property in May 1986 and was the owner thereof until its sale in 2005. There is no dispute that both the Brooklyn property and the Manhattan property were owned by the respective corporations and not by any individuals.

In 2001, upon the death of her husband, Alvin Miot, Defendant Harriot Miot became the

president and sole shareholder of Madcat86. In 2005, as president and sole shareholder of Madcat86, Defendant Harriet Miot sold the Manhattan property which was the only asset of Madcat86. There is no dispute that all of the proceeds of the sale were paid to Madcat86 and, after payment of taxes and other fees and expenses, the balance of the proceeds were then distributed by Madcat86 to Defendant Harriet Miot as the sole shareholder of Madcat86.

In 2006, Plaintiff commenced this action seeking a share of the proceeds from the sale of the Manhattan property. Plaintiff claims that by virtue of a 1985 gift of 140 shares of stock in Madcat70, he is entitled to a share of the assets of Madcat86. Plaintiff is asserting this claim even though the Manhattan property was owned by Madcat86, which was formed in 1986, one year after Plaintiff received his (gift of) Madcat70 stock.

After the trial in this action, Plaintiff has conceded¹ that Defendant Arnold Miot was never an officer, director or shareholder of either Madcat70 or Madcat86 and has discontinued this action as against him both in those capacities and in his individual capacity. Harriet Miot is the only remaining defendant.

It will be demonstrated herein that the evidence at trial established that Plaintiff is neither the actual nor beneficial owner of stock of Madcat86, the former owner of the Manhattan property, and is not entitled to any of the proceeds from the sale that were distributed by Madcat86 to Defendant Harriet Miot, the sole shareholder of Madcat86. Moreover, the evidence at trial has established that as a matter of law, Plaintiff has failed to state a cause of action against Defendant Harriet Miot. Plaintiff sued in his individual capacity alleging the diversion of corporate assets by Defendant Harriet Miot to her own enrichment. Under these circumstances, however, a shareholder may only

¹ See p. 1 of Plaintiff's Post-Trial Brief.

sue derivatively and not individually.

In other words, Plaintiff cannot prevail in this action, either as a matter of fact or as a matter of law. This action should be dismissed in its entirety.

FACTS ESTABLISHED AT TRIAL

Some time in the 1970s, Alvin Miot (Defendant Harriet Miot's late husband) desired to purchase a building located in Brooklyn, New York. That building was owned by Madcat70, a corporation that had been formed in the 1970s. In order to become the beneficial owner of the Brooklyn building, Alvin Miot purchased the stock of Madcat70. The Brooklyn building owned by Madcat70 was sold in 1987 (151, 201)². That transaction is not the subject of this action.

Madcat70 was dissolved by proclamation of the New York State Secretary of State pursuant to Tax Law §203-a (182, 184-185, 198, 202, 209). By operation of law, Madcat70 was no longer permitted to carry on any new business, although it could wind down its affairs (BCL §1005[a][1], [2]; Metered Appliances, Inc. v. 75 Owners Corp., 225 A.D.2d 338, 638 N.Y.S.2d 631 [1st Dept. 1996]). Madcat70's winding down of its affairs included the sale of the Brooklyn property in 1987 (185).

In 1985, Alvin Miot gifted 140 shares of stock of Madcat70, the owner of the Brooklyn property, to Plaintiff (Exhibits 23 and C). This is the stock certificate that underlies Plaintiff's claim in this action. Plaintiff made it clear in his testimony at trial that the stock was not collateral for any loan and was a pure gift from his brother, Alvin Miot (40-42). Plaintiff also admitted at trial that the stock certificate was mailed to him by his brother for reasons unknown; that he never paid for the stock; or looked at the books and records of the corporation; or performed any services for the

² () references the relevant pages of the trial transcript and/or the relevant trial exhibits.

corporation. In fact, Plaintiff made no inquiry whatsoever regarding the stock (24-27, 38-39). Moreover, Plaintiff did not even acknowledge that he was a shareholder in any Madcat Realty Corp. or declare the assets of any Madcat Realty Corp. in his sworn financial disclosure statement filed with the Florida courts in his 1999 divorce proceeding (Exhibit F) (51-53). In effect, Plaintiff was never involved in any way, manner, or form with the corporation and did not care about the corporation. Plaintiff simply took the stock certificate for 140 shares of Madcat70 and placed it in a file where it remained for over 20 years (28).

Equally, if not more significant, when the shares of stock of Madcat 70 were gifted to Plaintiff in 1985, Alvin Miot was the president and a shareholder of Almark Construction Corp., the entity that owned the Manhattan property in 1985 (154-155, Exhibit G). It is clear that at the time of the gift, if Alvin Miot had desired to transfer beneficial ownership of the Manhattan property to Plaintiff, he would have given him Almark stock rather than Madcat70 stock because Almark owned the Manhattan property at that time. Alvin Miot did not do this. Instead, Plaintiff received shares of stock of Madcat70 representing beneficial ownership in the Brooklyn property owned by Madcat70 thereby establishing that Alvin Miot deliberately did not intend to transfer an interest in the Manhattan property to Plaintiff.

In 1986, Alvin Miot decided to sell the Manhattan property at issue to a different corporation but still retain a beneficial interest in the Manhattan property. Madcat70 could not purchase the Manhattan property because it was precluded by BCL §1005(a)(1) from carrying on new business due to its dissolution by the New York State Secretary of State. As a result, on February 21, 1986, a new corporation was formed to purchase the Manhattan property, i.e., Madcat86 (Exhibit A) (164-166, 189-190). If Alvin Miot had wanted Madcat70 to own the Manhattan property (thereby making

Plaintiff a beneficial owner of the Manhattan property), all he had to do was reinstate Madcat70 to good standing (Tax Law §203-a[7]). He did not do this. Instead, Alvin Miot formed a new corporation to purchase the Manhattan property (189-190).

For reasons known only to him, Alvin Miot called the new corporation Madcat Realty Corp. ("Madcat86"). The name Madcat Realty Corp. was available as a corporate name because the former corporation by that name had been previously dissolved by the New York State Secretary of State and, after three (3) months, the name became available for re-use as a corporate name (Tax Law §203-a[6]) (186, 206).

Soon after the formation of the new corporation, Madcat86 purchased the Manhattan property on May 19, 1986. Significantly, Plaintiff's witness, Jack Glasser, Esq. (who was Alvin Miot's attorney prior to Alvin Miot's death and who assisted Alvin Miot in transferring the Manhattan property to the new corporation [159]), finally admitted at trial that the purchaser of the Manhattan property from Almark Construction Corp. in 1986 had to be Madcat86, the new corporation formed by Alvin Miot (188).

In 2005, Defendant Harriot Miot, as president and sole shareholder of Madcat86, sold the Manhattan property to 402-406 East 118th Street Associates, LLC (Exhibits 5 and D). The testimony and documentary evidence at trial established that each of the checks received at the closing of the sale of the Manhattan property were made payable to Madcat Realty Corp. (97, 98; Exhibits 11, 12, 13) and that each of these checks was deposited into the Madcat Realty Corp. checking account at Fleet Bank (100). After taxes and other fees and expenses were paid from the Madcat Realty Corp. account (232), the balance of the proceeds was disbursed to Defendant Harriet Miot by corporate check which she deposited into her personal account (105, 232). No other person

or entity received any of the sale proceeds either at the closing or from the Madcat Realty Corp. checking account and no other person was entitled to a share of the net proceeds from the sale of the Manhattan property.

TIME-LINE SHOWING THE FACTS

Brooklyn Property

1970s: Madcat Realty Corp. ("Madcat70") owned the property (151)

Alvin Miot purchased the stock of Madcat Realty Corp. and became the beneficial owner of the Brooklyn property.

1980s: Madcat70 was dissolved by proclamation of the New York State Secretary of State pursuant to Tax Law §203-a (182, 184-185, 198, 202, 209) and began winding down its affairs (185).

1985: Alvin Miot gifted 140 shares of stock of Madcat70 to Plaintiff (Exhibits 23 and C).

Alvin Miot was the president of Almark Construction Corp. Therefore, if he wanted to transfer beneficial ownership of the Manhattan property to Plaintiff in 1985, he would have given him Almark stock rather than Madcat70 stock because Almark owned the Manhattan property at that time.

Manhattan Property 400A East 118 Street

1983: Manhattan property sold by Kadar Air Conditioning Corp. to Almark Construction Corp. (154-155, Exhibit G)

Alvin Miot was president of Almark Construction Corp.

1986: Madcat Realty Corporation ("Madcat86") was incorporated as a new corporation (Exhibit A) (164-166, 189-190) on February 21, 1986.

1986: Manhattan property purchased by Madcat86 from Almark Construction Corp. on May 19, 1986 (Exhibits 28 and B)

1987: Madcat70 sells the Brooklyn Property (201).

2005: Defendant Harriot Miot, as president and sole shareholder of Madcat86 sells the Manhattan property to 402-406 East 118th Street Associates, LLC (Exhibits 5 and D).

Each of the checks received at the closing of the sale of the Manhattan property were made payable to Madcat Realty Corp. (97, 98; Exhibits 11,12) and each of these checks was deposited into the Madcat Realty Corp. checking account at Fleet Bank (100). After the proceeds of the sale were deposited in the Madcat Realty Corp., and after the necessary fees and expenses were paid therefrom, the balance of the proceeds were disbursed to Defendant Harriet Miot by corporate check which was deposited into her personal account (105, 232).

ARGUMENT

A. THE ACTION MUST BE DISMISSED: PLAINTIFF WAS NEVER A SHAREHOLDER OF MADCAT86

The timing of the transactions demonstrates that there can be no question that the Manhattan property was purchased and owned by Madcat86 and not by Madcat70. Moreover, there is no question of fact that the stock certificate issued to Plaintiff in 1985 (Exhibits 23 and C) was for shares of Madcat70 and not of Madcat86. It was not possible to issue stock for Madcat86 in 1985 because Madcat86 was not formed until February 21, 1986 (Exhibit A) (164-166, 187, 189-190).

In addition, there can be no mistake as to Alvin Miot's intent when he transferred the 140 shares of stock of Madcat70 to Plaintiff. If the intent of the 1985 gift was to make Plaintiff a beneficial owner of the Manhattan property, Alvin Miot would have gifted shares of stock of Almark Construction Corp. to Plaintiff rather than shares of stock of Madcat70. Under these circumstances, it is clear that Plaintiff never had any shares of stock of Madcat86 and is not entitled to any of the proceeds from the sale of the Manhattan property.

Having been confronted at trial by a time-line establishing that he did not receive shares of stock of Madcat86, the corporation that owned the Manhattan property, Plaintiff now relies upon the successor/continuation corporation doctrine and the *de facto* corporation doctrine to meet his burden of proof that he is entitled to a 70% share of the proceeds from the sale of the Manhattan property. Plaintiff's reliance on these doctrines is misplaced and unavailing.

Citing New Jersey law, Plaintiff argues that a corporation is a mere continuation of another corporation where (a) the second corporation continued the business of the old corporation; (b) the two (2) corporations have at least one common officer or director; and (c) the first corporation was rendered insolvent because it was dissolved. Jackson v. Diamond T. Trucking, Co., 100 N.J. Super.

186, 241 A.2d 471 (Superior Ct, 1968). Pursuant to this theory, Plaintiff contends in his post-trial brief that Madcat86 is a mere continuation of Madcat70 on the grounds that both Madcat70 and Madcat86 had the

“same name, same property, same revenue stream and expenses, no doubt the same bank account and same stationery” (see p. 14 of Plaintiff’s Post-Trial Brief”).

Conspicuously missing, however, is any reference to testimony in the trial transcript or to any documentary evidence admitted at trial wherein any of these “facts” were established. That is because, except for the same name, there was no testimony or documentary evidence presented at trial to show that Madcat70 and Madcat86 had the same property, or the same assets, or the same revenue stream and expenses, or the same bank account or the same stationery.

It must be noted that Plaintiff omitted two (2) additional and significant factors listed by the New Jersey Court in Jackson, *supra*, that are to be considered to determine if there is a successor/continuation corporation. These missing factors are (a) a transfer of assets from the first corporation to the second corporation; and (b) for less than adequate consideration. The complete list of factors to be considered, as enunciated in Jackson, *supra*, consists of: (1) a transfer of assets from the first corporation to the second corporation; (2) for less than adequate consideration; (3) the second corporation continued the business of the old corporation; (4) the two (2) corporations have at least one common officer or director; and (5) the first corporation was rendered insolvent because it was dissolved.

When the missing factors are added, New Jersey law comports with New York law. Pursuant to New York law, the factors tending to show a successor/continuation corporation are as follows: (1) the second corporation purchased almost all of fixed assets and intangibles of the first

corporation; (2) the first corporation ceased to exist soon after the sale of the assets to the second corporation; (3) the second corporation assumed the name of or a similar name to the first corporation; (4) at least one officer is similar to both corporations; and (5) both corporations were in the same business. Burgos v. Pulse Combustion, Inc., 227 A.D.2d 295, 642 N.Y.S.2d 882 (1st Dept. 1996).

It is not surprising that Plaintiff omitted the factors that require a transfer of assets between the corporations for insufficient consideration where, as here, there was no evidence elicited at trial to establish that there was any transfer of assets between Madcat70 and Madcat86. Madcat70 owned the Brooklyn property. There was no testimony or documentary evidence offered at trial to demonstrate that Madcat70 had any other assets. During Plaintiff's testimony, Plaintiff could not recall any transfer of the Brooklyn property to Madcat86 (48). Defendant Harriet Miot, who was called to the witness stand as Plaintiff's witness, testified that she had no documents showing a transfer of the Manhattan property from Madcat70 to Madcat86 (89-90). Another of Plaintiff's witnesses, Jack Glasser, Esq., testified that he had no knowledge of any transfer of real estate between Madcat70 and Madcat86 (141) and further testified that at all relevant times, the Brooklyn property was owned by Madcat70 (201).

Most importantly, no deed was produced at trial to establish that the Brooklyn property was ever transferred to Madcat86. This is significant because pursuant to New York law, transfer of title to real property is accomplished only by the execution and delivery of a deed. Manhattan Life Insurance Company v. Continental Insurance Companies, 33 N.Y.2d 370, 353 N.Y.S.2d 161 (1974). A copy of a deed is easily obtained because deeds are publicly recorded/filed documents. Therefore, given the ease by which such a deed could be obtained by Plaintiff, his failure to produce a deed

showing that the Brooklyn property was transferred to Madcat86 from Madcat70 requires the inference that **no such transfer** ever took place.

Finally, contrary to Plaintiff's argument, the evidence at trial established that Madcat70 was not stripped of its assets or made insolvent due to its dissolution. It still owned the Brooklyn property until 1987 (185), which was after its dissolution and after Madcat86 was formed in February 1986 (Exhibit A) (164-166, 189-190). Therefore, whether one applies the New Jersey test or the New York test to determine if the second corporation is a successor/continuation of the first corporation, it is clear that Madcat86 cannot be deemed to be a successor to or a continuation of Madcat70.

The *de facto* corporation doctrine is equally unavailing to Plaintiff. A *de facto* corporation may be found if, after dissolution, the corporation continues to conduct new business rather than merely winding down its affairs. L-Tec Electronics Corporation v. Cougar Electronic Organization, Inc., 198 F.3d 85 (USCA, 2nd Circ. 1999); H.E.G. Development and Management Corp. v. Blumberg, 171 Misc.2d 740, 656 N.Y.S.2d 127 (Sup. Ct, NY County 1997). In support of the application of this doctrine to the case at bar, Plaintiff relies heavily upon the decision in D&W Central Station Alarm Co., Inc. v. Copymasters, Inc., 122 Misc.2d 453, 471 N.Y.S.2d 464 (Sup. Ct., Queens Co. 1983).

In D&W Central Station Alarm Co., Inc., *supra*, the testimony at trial established that during the period between dissolution and reincorporation, as well as after reincorporation, all substantive business activities continued without change, and that the two corporations were substantially the same as they both had the same name, location, officers, shareholders, managers, employees, assets, liabilities, debtors, creditors, purposes, leasehold interests, customers and business. Under these

circumstances, the D&W court held that the second corporation of the same name was a mere continuation of the first corporation that had been previously dissolved by proclamation.

In the case at bar, however, there was no evidence at trial that Madcat70 and Madcat86 had the same assets, or the same liabilities, or the same debtors, or the same creditors, or the same leasehold interests, or the same customers. There was also no evidence that Madcat70 conducted new business after dissolution. Madcat86 was specifically formed in 1986 because Madcat70 could not purchase the Manhattan property due to its dissolution by the New York State Secretary of State. The facts in D&W Central Station Alarm Co., Inc., supra are clearly distinguishable from the facts established at trial in the instant case and that decision does not support the application of the *de facto* corporation doctrine (or the successor/continuation corporation doctrine) to the instant case. Plaintiff has failed to sustain his burden of proof that he was a shareholder of Madcat86, the corporation that owned and sold the Manhattan property, and the action must be dismissed, as a matter of fact.

**B. THE ACTION MUST BE DISMISSED:
PLAINTIFF'S INDIVIDUAL SHAREHOLDER SUIT
MAY NOT BE MAINTAINED AS A MATTER OF LAW**

It will be demonstrated below that even if Plaintiff established at trial that he was a shareholder of Madcat86 (which he did not do - see discussion *infra*), Plaintiff's individual action against Defendant Harriet Miot may not be maintained as a matter of law. Pursuant to the facts elicited at trial, Plaintiff was required to commence a shareholder derivative suit against Madcat86. The result of Plaintiff's error is that Plaintiff has failed to plead a cause of action against Defendant Harriet Miot upon which relief may be granted by this Court, and the action must be dismissed.

The law is well settled. Where a purported shareholder seeks vindication of his rights as a shareholder and recovery of corporate assets and profits diverted from him in that capacity, the shareholder must sue derivatively and may not sue individually. It is only where an independent duty is owed to a shareholder apart from the duty owed to the corporation that an individual suit may be maintained.

“For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation (*Citibank v. Plapinger*, 66 N.Y.2d 90, 93, n., 495 N.Y.S.2d 309, 485 N.E.2d 974; *General Motors Acceptance Corp. v. Kalkstein*, 101 A.D.2d 102, 474 N.Y.S.2d 493, appeal dismissed, 63 N.Y.2d 676; *Fifty States Mgt. Corp. v. Niagara Permanent Sav. & Loan Assn.*, 58 A.D.2d 177, 396 N.Y.S.2d 925). Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged (*General Rubber Co. v. Benedict*, 215 N.Y. 18, 109 N.E.96 [director of parent corporation who acquiesced in the misuse of funds of its subsidiary; action by parent maintainable]; *Hammer v. Werner*, 239 App. Div. 38, 265 N.Y.S. 172 [issuance of treasury stock to directors at an inadequate price and without affording plaintiff the right to purchase his proportionate part; individual action maintainable].)....”

Abrams v. Donati, 66 N.Y.2d 951, 498 N.Y.S.2d 782 (1985)

If it is determined that the action intermingles both individual and derivative claims, the action must still be dismissed. Abrams v. Donati, 66 N.Y.2d 951, 498 N.Y.S.2d 782 (1985); Balk v. 125 West 92nd Street Corporation, 24 A.D.3d 193, 806 N.Y.S.2d 31 (1st Dept. 2005); Barbour v. Knecht, 296 A.D.2d 218, 743 N.Y.S.2d 483 (1st Dept. 2002). These principals of law apply equally to close corporations such as Madcat86. Glenn v. Hoteltron Systems, Inc., 74 N.Y.2d 386, 547 N.Y.S.2d 816 (1989); Erllich v. Hambrecht, 19 A.D.3d 259, 797 N.Y.S.2d 471 (1st Dept. 2005); Wolf v. Rand, 258 A.D. 401, 685 N.Y.S.2d 708 (1st Dept. 1999); Rubenstein v. Rubenstein, 11 Misc.3d 1062(A), 816 N.Y.S.2d 700 (Sup. Ct, NY County, 2006, Fried, J.).

The following cases illustrate the application of the rules. In Abrams v. Donati, 66 N.Y.2d 951, 498 N.Y.S.2d 782 (1985), a shareholder alleged that other shareholders diverted corporate assets to their personal use. The Court of Appeals held that allegations of mismanagement or diversion of corporate assets by officers or directors to their own enrichment, without more, pleads a wrong to the corporation requiring a shareholder derivative suit. This holding was followed and cited by the Appellate Division, First Department in Lamberti v. 30 Real Estate Corp., 8 A.D.3d 211, 778 N.Y.S.2d 690 (1st Dept. 2004):

“Allegations of mismanagement or diversion of corporate assets or fraud by officers or directors constitute wrongs for which a shareholder can sue derivatively, but has no standing to sue in his individual capacity (Abrams v. Donati, 66 N.Y.2d 951, 498 N.Y.S.2d 782, 489 N.E.2d 751).”

In other words, a shareholder derivative suit is necessary because the seizure of corporate assets for the wrongdoer's own profit resulted in a corporate injury as it deprived the corporation of those assets. The innocent shareholder is injured only to the extent that he was deprived of his entitlement to share in corporate profits. Glenn v. Hoteltron Systems, Inc., 74 N.Y.2d 386, 547 N.Y.S.2d 816 (1989). See also, Erllich v. Hambrecht, 19 A.D.3d 259, 797 N.Y.S.2d 471 (1st Dept. 2005), wherein the Appellate Division, First Department held that the allegation by one shareholder that the other shareholder diverted the plaintiff shareholder's contractual right to certain fees, was a derivative suit and not a conversion suit that could be brought in the plaintiff shareholder's individual capacity; and Wolf v. Rand, 258 A.D.2d 401, 685 N.Y.S.2d 708 (1st Dept. 1999) wherein the Appellate Division, First Department held that a shareholder derivative suit is required where the case seeks vindication of one's rights as a shareholder and recovery of corporate assets and profits diverted from them in

that status, even in a close corporation³.

Directly on point is the holding in Paradiso & DiMenna, Inc. v. DiMenna, 232 A.D.2d 257, 649 N.Y.S.2d 126 (1st Dept. 1996). In Paradiso & DiMenna, Inc., the Appellate Division, First Department held that **conversion of funds from the corporate account is a corporate injury** because it deprives the corporation of the funds.

At trial, Defendant Harriet Miot, who was called to the stand as Plaintiff's witness, testified on direct examination that each of the checks received at the closing of the sale of the Manhattan property were made payable to Madcat Realty Corp. (97, 98; Exhibits 11,12, 13) and that each of these checks was deposited into the Madcat Realty Corp. checking account at Fleet Bank (100). It was only after the proceeds of the sale were deposited into the Madcat Realty Corp. checking account, and after the necessary fees and expenses arising from the sale were paid therefrom, that the balance of the proceeds was disbursed to Defendant Harriet Miot by corporate check which was deposited into her personal account (105). This direct testimony was confirmed on cross-examination (231-232) and was not rebutted. Moreover, in Plaintiff's direct testimony, Plaintiff confirmed that the proceeds of the sale were tendered to Madcat⁸⁶ when he stated that he had never received any of the sale proceeds from the corporation (34-36).

³ Cf., Herman v. Feinsmith, 39 A.D.3d 327, 834 N.Y.S.2d 140 (1st Dept. 2007) - Individual suit was allowed based upon an alleged breach of a separate shareholder agreement, which involved a duty apart from that owed to the corporation. There was no evidence of a separate shareholder agreement adduced at trial in this action. Behrens v. Metropolitan Opera Association, Inc., 18 A.D.3d 47, 794 N.Y.S.2d 301 (1st Dept. 2005) - Plaintiff, a shareholder in an S Corporation, could sue individually because she was seeking recovery for lost income and not corporate profits, and because the defendant owed an independent tort duty to the plaintiff apart from that owed to her corporation. In the instant case, there was no independent tort duty owed to Plaintiff and he is seeking recovery of corporate profits.

Herbert H. Post & Co. v. Sidney Bitterman, Inc., 219 A.D.2d 214, 639 N.Y.S.2d 329 (1st Dept. 1996) - Post owed independent duty to individual shareholders apart from duty owed to corporation because Post acted simultaneously as accountant and tax adviser to the shareholders personally as well as in a business capacity. There was no evidence to this effect at the trial in this action.

Therefore, pursuant to the un-rebutted facts elicited at trial, if there was any conversion of these proceeds by Defendant Harriet Miot (which is not conceded), it was from the corporate account of Madcat86 and resulted in a corporate, not individual, injury. Paradiso & DiMenna, Inc. v. DiMenna, 232 A.D.2d 257, 649 N.Y.S.2d 126 (1st Dept. 1996). Under these circumstances, it is clear that even if Plaintiff established at trial that he was a shareholder of Madcat86, this action must be dismissed as a matter of law because Plaintiff sued individually, and not derivatively, seeking recovery of profits diverted from him in his shareholder capacity.

CONCLUSION

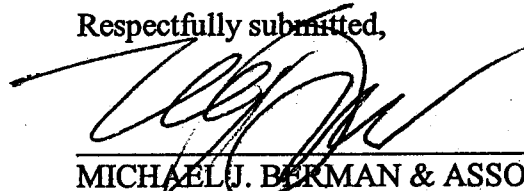
This action should be dismissed in its entirety.

It has been established herein that Plaintiff cannot prevail in this action as a matter of fact. The evidence at trial demonstrated that Plaintiff is neither the actual nor beneficial owner of stock of Madcat86, the owner of the real property at issue, and is not entitled to any of the proceeds from the sale that were distributed by Madcat86 to Defendant Harriet Miot, the sole shareholder of Madcat86.

It has also been demonstrated that Plaintiff cannot prevail in this action as a matter of law. Plaintiff improperly sued in his individual capacity alleging the diversion of corporate assets by Defendant Harriet Miot to her own enrichment. Under these circumstances, the law requires a shareholder derivative suit. The error in commencing an individual suit rather than a shareholder suit is fatal to this action and it must be dismissed as a matter of law.

Dated: New York, New York
April 10, 2009

Respectfully submitted,



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