

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**In the Matter of the Application of
PRADIP GOHIL, KANAKSINH VAGHELA and
RAJSHAKTI JADEJA, individually and
as shareholders of Bayside Mini Grocery,
211-12 Northern Blvd., Corp., BAYSIDE MINI
GROCERY and 211-12
NORTHERN BLVD., CORP.,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 017824-10
Motion Seq. Nos. 5, 6, 7 and 8
Submission Date: 5/18/12**

Petitioners-Plaintiffs,

**For the Judicial Dissolution of
BAYSIDE MINI GROCERY and 211-12
NORTHERN BLVD., CORP.,**

- against -

**PRATAP GOHIL, UDAYSINH GOHIL and
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE,**

Respondents-Defendants.

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Papers Read on these Motions:

- Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits...x**
- Petitioners-Plaintiffs' Memorandum of Law in Support.....x**
- Notice of Cross Motion, Affidavits in Support/Opposition,
Affirmation in Support/Opposition and Exhibits.....x**
- February 27, 2012 Correspondence and Notice of Rejection.....x**
- Affirmation in Opposition to Cross Motion and Exhibits.....x**
- Petitioners-Plaintiffs' Memorandum of Law in Opposition.....x**
- Defendants' Reply Affirmation.....x**
- Petitioners-Plaintiffs' Reply Memorandum of Law.....x**
- Notice of Motion for Sanctions, Affirmation in Support and Exhibits.....x**
- Notice of Cross Motion, Affirmation in Opposition/Support and Exhibits.....x**
- Reply Affirmation in Further Support of Motion for Sanctions.....x**

Papers Read (cont.)

Affirmation in Opposition to Cross Motion to Disqualify and Exhibits.....x
Memorandum of Law in Opposition to Cross Motion to Disqualify.....x
Affidavit of Receiver and Exhibits.....x

This matter is before the court on 1) the motion filed by Petitioners-Plaintiffs Pradip Gohil (“Pradip”), Kanaksinh Vaghela (“Kenny”), Rajshakti Jadeja (“Raj”), Bayside Mini Grocery (“Mini Grocery”) and 211-12 Northern Boulevard, Corp. (“Plaintiffs”) on January 9, 2012, 2) the cross motion filed by Pratap Gohil (“Pratap”) and Udaysinh Gohil (“Udaysinh”) (“Defendants”) on February 17, 2012, 3) the motion filed by Plaintiffs on April 16, 2012, and 4) the cross motion filed by Defendants on May 4, 2012, all of which were submitted on May 18, 2012. For the reasons set forth below, the Court 1) grants Plaintiffs’ motion and directs that the Mini Grocery is dissolved,¹ and Defendants’ counterclaims are dismissed; 2) denies Defendants’ cross motion in its entirety; 3) denies Plaintiffs’ motion for sanctions; and 4) denies Defendants’ cross motion for sanctions and disqualification. The Court directs the parties to provide the Receiver, on or before August 16, 2012, with the documents set forth in Exhibit F to the Receiver’s Affidavit, which contains “a list of documents that the Receiver would like to review pertaining to Bayside Mini Grocery.” **The conference scheduled before the Court on July 18, 2012 at 9:30 a.m. is hereby adjourned to August 21, 2012 at 9:30 a.m.**

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order 1) pursuant to CPLR §§ 3211(a)(1) and (7), dismissing Defendants’ counterclaims (“Counterclaims”) contained in their Verified Answer; and 2) granting specific performance of the Settlement Agreement dated July 22, 2009 to dissolve the Mini Grocery and 211-12 Northern Blvd., Corp. (“Property”). Plaintiffs subsequently advised the Court that the Individual Plaintiffs have agreed to withdraw their application to dissolve the Property.

Defendants cross move for an Order 1) awarding specific performance of the Settlement Agreement dated July 22, 2009 and directing Plaintiffs to a) pay Pratap and Udaysinh, as

¹ Plaintiffs have withdrawn their motion to dissolve 211-12 Northern Blvd., Corp.

shareholders of the Mini Grocery, a salary of \$723 per week; b) pay all arrears of salary due to Pratap and Udaysinh from August 1, 2010 to the present date; and c) comply with the Settlement Agreement, Purchase and Sale Agreement and Term Sheet executed by the parties; 2) dismissing the Petition-Complaint (“Petition”); 3) dismissing Plaintiffs’ motion to dismiss Defendants’ counterclaims; and 4) dismissing Plaintiffs’ motion for specific performance in its entirety.

Plaintiffs move for an Order, pursuant to 22 N.Y.C.R.R. § 130-1.1, imposing sanctions against Defendants for their failure to withdraw their cross motion to dismiss the Complaint and for specific performance seeking back salary against the Companies.

Defendants cross move for an Order 1) dismissing Plaintiffs’ application for sanctions in its entirety; 2), granting Defendants’ application for sanctions pursuant to 22 N.Y.C.R.R. § 130-1.1; and 3) disqualifying Michael Leon, Esq. (“Leon”) and Jaspan Schlesinger LLP (“Jaspan Schlesinger”) as attorneys for Plaintiffs, pursuant to NY DR §§ 5-101, 102 and 105.

B. The Parties’ History

The parties’ history is set forth in detail in prior decisions of the Court dated October 20, 2010 (“2010 Decision”) and January 23, 2012 (“2012 Decision”) (“Prior Decisions”). The Court incorporates the Prior Decisions by reference as if set forth in full herein.

As noted in the Prior Decisions, the Petition alleges as follows:

Pradip is the owner and holder of twenty five percent (25%) of the voting shares of the Mini Grocery, as well as the owner and holder of fifty percent (50%) of the voting shares of 211-12 Northern Boulevard (“Property”). Kenny is the owner and holder of twenty two and one half percent (22.5%) of the voting shares of the Mini Grocery, as well as the owner and holder of twenty percent (20%) of the voting shares of the Property. Raj is the owner and holder of ten percent (10%) of the voting shares of the Property. The Mini Grocery and Property are New York corporations with offices located at 211-12 Northern Boulevard, Bayside, New York.

Pratap is the owner and holder of twenty two and one half percent (22.5%) of the voting shares of the Mini Grocery, as well as the owner and holder of twenty percent (20%) of the voting shares of the Property. Udaysinh is the owner and holder of twenty percent (20%) of the voting shares of the Mini Grocery, and the owner and holder of ten percent (10%) of the voting

shares of the Property. The Mini Grocery, which operates as a bodega that sells various consumer goods to the public, is a tenant of the Property. The Petitioners and Respondents are related to each other.

On July 13, 2010 an annual and special meeting of the shareholders ("M.G. Shareholders") of the Mini Grocery was held, at which meeting the M.G. Shareholders voted to 1) terminate all existing directors of the board of directors ("Board") and elect a new Board consisting of Pradip, Raj and Kenny; and 2) dissolve the Mini Grocery no earlier than July 23, 2010. Also on July 13, 2010, an annual and special meeting of the shareholders of the Property ("Property Shareholders") was held at which meeting the Property Shareholders voted to 1) terminate all existing directors of the Board and elect a new Board consisting of Pradip, Raj and Kenny; and 2) dissolve the Property no earlier than July 23, 2010. Petitioners submit that, as a result, the M.G. and Property Shareholders have voted to dissolve the Companies and wind up the Companies' affairs.

Petitioners have recently learned that, from on or about 1998 through the present, Respondents have diverted monies, profits and/or distribution of proceeds from retained earnings ("Profits") from the Mini Grocery to Respondents, without Petitioners' permission and in violation of their fiduciary duties and respective equity interests in the Mini Grocery. Respondents allegedly made false representations to Petitioners regarding the correctness of Profits that Petitioners received. Petitioners have demanded that Respondents return the Profits and distribute to Petitioners the appropriate Profits which Respondents have refused to do. Petitioners submit that, in light of the foregoing, following dissolution, the majority shareholders of the Companies should wind-up the affairs of the Companies and pursue any claims against Respondents on behalf of the Companies.

On or about August 11, 2010, Respondents filed petitions ("Family Court Petitions") with the Queens County Family Court against Pradip and Kenny seeking a temporary restraining order to refrain from, *inter alia*, harassment and disorderly conduct. Petitioners allege that the allegations in the Family Court Petitions are false and were designed to circumvent the votes of the majority shareholders to terminate Udaysinh as an employee of the Mini Grocery, and to terminate Pratap's salary. Petitioners dispute the allegations in the Family Court Petitions, and

submit that it is Respondents who have engaged in harassing conduct against Petitioners. On or about August 24, 2010, Kenny and Pradip obtained temporary restraining orders against Udaysinh and Pratap to refrain from, *inter alia*, harassment and disorderly conduct against Kenny and Pradip.

The Petition contains five (5) causes of action: 1) request for dissolution of the Mini Grocery pursuant to New York State Business Corporation Law (“BCL”) § 1103, 2) request for dissolution of the Property pursuant to BCL § 1103, 3) breach of fiduciary duty by Respondents, 4) request for injunctive relief, and 5) demand for an accounting.

In the 2010 Decision, the Court denied Plaintiffs’ application for injunctive relief (“Prior Motion”) based on the Court’s conclusion that, based on the documentation provided and in consideration of the conflicting affidavits presented, Plaintiffs had not established a likelihood of success on the merits. In opposition to the Prior Motion, Pratap affirmed, *inter alia*, that in 2004 he learned that Pradip had 1) obtained a mortgage on the Property without seeking shareholder approval or notifying the other owners; 2) falsely certified to HSBC that he was the President and sole shareholder of the business; 3) wanted to use \$15,000 of the business’ proceeds from the sale of lottery tickets for personal investments; and 4) placed his wife on the payroll and paid her a salary, despite the fact that she performed no work for the business. Pratap affirmed that he asked Pradip to return these funds to the business, which he has not done. Pratap initiated a lawsuit that led to a settlement agreement dated July 22, 2009 (“Settlement Agreement”) and a purchase and sale agreement (“Agreement”) of the same date. The Agreement contains the signatures of Pratap, Pradip, Kenny, Udaysinh and Raj. Pratap suggested that Petitioners have moved for dissolution in an effort to avoid their obligations under that agreement.

On April 27, 2011, the Court signed an Order Appointing Receiver for the purposes of selling the business known as Bayside Mini Grocery (“Company”) and the Property. On July 15, 2011, the Court signed an Order authorizing the Receiver to hire Colliers International LI Inc. (“Colliers”) as a real estate broker to list, market and sell the Property subject to the terms and conditions provided for in the proposed brokerage agreement with Colliers. The Court further ordered that the Property shall be listed, marketed and sold subject to certain terms and conditions.

In their Verified Answer and Counterclaim (Ex. B to Leon Aff. in Supp.) dated August 31, 2011, Defendants allege that Plaintiffs breached the Settlement Agreement by 1) failing to pay Pratap and Udaysinh their salary as shareholders of Mini Grocery; 2) failing to pay back wages in an amount to be determined by non-party Mannherba Jadeja; 3) terminating Pratap as Director and Officer of Mini Grocery and the Property; and 4) terminating Udaysinh as Director and Officer of Mini Grocery (Counterclaims at ¶¶141- 144). Defendants assert thirteen (13) Counterclaims: 1) wrongful discharge of Pratap pursuant to Business Corporation Law (“BCL”) §§ 708 and 716, 2) wrongful discharge of Pratap pursuant to BCL § 605, 3) wrongful discharge of Pratap pursuant to BCL § 706, 4) breach of contract based on the allegation that the termination of Pratap as President an employee of Mini Grocery on October 28, 2008 was in violation of the agreement among the shareholders that the shareholders could remain employed as long as Mini Grocery remained in business, 5) breach of fiduciary duty, 6) breach of duty of good faith and fair dealing, 7) prima facie tort, 8) breach of contract and unjust enrichment for failing to compensate Pratap for moneys he contributed to Mini Grocery from his personal funds, 9) wrongful discharge of Defendants in violation of the Settlement Agreement, 10) failure to pay salary in violation of the Settlement Agreement, 11) failure to pay back wages in violation of the Settlement Agreement, 12) request for punitive damages, and 13) demand for an accounting with respect to the Mini Grocery and Property.

In the 2012 Decision, the Court addressed the Receiver’s motion for an Order permitting the Receiver to 1) accept the offer submitted by Plaintiffs Pradip and Kenny on September 8, 2011 to purchase the Property for \$2,500,000.00 through the redemption of the shares of stock in 211-12 Northern Blvd. Corp. owned by Defendants Pratap and Udaysinh (“Pradip Offer”); 2) sign the Redemption Agreement; and 3) close on the Redemption Agreement pursuant to the terms and conditions contained therein.

In the 2012 Decision, the Court concluded that the Receiver, in determining the best and highest offer, properly considered the tax consequences of the Offers, and was permitted to consider those tax consequences, as well as any other factors he deemed appropriate, in complying with the Court’s directions. The Court further determined, however, that there was some ambiguity in the prior Order regarding whether the Receiver had the discretion to accept an

offer to purchase the Property that was not a straightforward purchase of the Property, but rather involved the redemption of stock, as set forth in the Pradip Offer. In light of that ambiguity, the claims that the Receiver did not adequately consider all Offers and the Receiver's concession that the Final Eastend Offer might be the highest and best Offer, the Court granted the Receiver's alternative application for relief and directed that 1) the Court-ordered auction shall be re-opened on a limited basis to permit Pradip and Eastend each to submit to the Receiver separate one time sealed bids on or before 5:00 p.m. on February 17, 2012 reflecting his/its highest and best offer, which shall not be less than \$2,600,000, and the Receiver was permitted in his sole discretion to accept whichever offer (the Pradip Offer, or the new offer(s) by Respondents and/or Eastend) was higher and better, whether the transaction be as a stock redemption or deed transfer; and 2) if no further bids were obtained in the reopened auction, the Receiver was authorized to accept the Pradip Offer. The Court directed, further, that no extensions would be granted with respect to the February 17, 2012 deadline.

In support of Plaintiffs' instant motion to dismiss the Counterclaims and to direct specific performance of the Settlement Agreement (Ex. C to Leon Aff. in Supp.), Raj affirms that he has complied with paragraph 5 of the Settlement Agreement which provides as follows:

There shall be a freeze on the hiring and/or firing of any employee of the Mini Grocery beginning on the date of this agreement, except that Raj Jadeja shall, in his sole discretion, have the power to hire or fire any employee.

Raj affirms that on July 13, 2010, he exercised his discretion and terminated Defendants as employees of the Mini Grocery. Moreover, although the Settlement Agreement authorizes Raj to terminate Defendants for any reason, Raj terminated Defendants for cause upon learning that, from 1998 and possibly earlier, they improperly diverted funds belonging to the Mini Grocery. Raj affirms that he memorialized his decision to terminate Defendants through his vote on July 13, 2010 at the annual and special meeting of the shareholders of the Mini Grocery. At the meeting, the shareholders, by majority vote, terminated the existing directors of the board and elected a new board consisting of Pradip, Kenny and Raj.

Raj also asks the Court to enforce paragraph 12 of the Settlement Agreement which provides as follows:

The shareholders herein agree to make application to dissolve 211-12 and Mini Grocery

pursuant to the [BCL], within a reasonable period of time after the final tax returns for each entity have been filed with the New York State Department of State, Division of Corporations.

Raj affirms that the Mini Grocery shareholders agreed, by majority vote, to dissolve the Mini Grocery no earlier than July 23, 2010, at which time the Mini Grocery could file for dissolution and wind up the corporation's affairs. On July 13, 2010, at the annual and special meeting of the shareholders of the Property, the Property Shareholders voted to dissolve the Property no earlier than July 23, 2010, at which time the Property could file for dissolution and wind up the corporation's affairs. Thus, Raj Submits, the Mini Grocery and Property should be dissolved.

Plaintiffs note that the Counterclaims are asserted against the companies, and have advised the Court that Pradip, Kenny and Raj ("Individual Plaintiffs") join in the Companies' application to dismiss the counterclaim and for specific performance of the Settlement Agreement (Ps' April 13, 2012 Reply Memo. of Law at n. 1). The Individual Plaintiffs have agreed to withdraw their application to dissolve the Property (*id.*). Plaintiffs note, further, that on March 2, 2012, Defendants withdrew that part of their cross motion and opposition that seeks to enforce the sale of the Property under the Purchase and Sale Agreement. Thus, Plaintiffs submit, any reliance by Defendants on that Agreement to oppose Plaintiffs' motion should similarly be withdrawn (*id.* at n. 2).

Pratap disputes Raj's claim that he fired Defendants because they improperly diverted monies from the Mini Grocery. Pratap affirms that he 1) "[has] never worked a day at the [Mini Grocery] since we signed the Settlement Agreement" (Pratap Aff. at ¶ 14); 2) was never advised by Raj that he was fired in July of 2010; and 3) "was only notified by a piece of paper entitled 'Minutes of the Special Meeting of the Board of Directors of [the Mini Grocery] that Uday and I had been terminated as employees and that they also decided to terminate our salary we received pursuant to the Settlement Agreement'" (*id.*).

Pratap affirms that he learned that Plaintiffs have begun the process of winding up the business of the Mini Grocery and have advised the New York City Department of Consumer Affairs that the Mini Grocery is out of business. Pratap affirms that Plaintiffs have obtained a

new cigarette license under a new corporate entity and have begun using a different corporate entity name at the premises where the Mini Grocery operated.

Udaysinh disputes Raj's claim that he had the authority to fire Udaysinh as an employee of the Mini Grocery. Udaysinh submits that while Raj could hire and fire anyone working as an employee at the Mini Grocery, "[h]e was never given the discretion to hire and fire employees who were also shareholders" (Udaysinh Aff. at ¶ 8). Udaysinh submits, *inter alia*, that 1) he and Pratap did not attend the shareholders' meeting because they knew that a proper and legal meeting could not be conducted without them; 2) the salary agreed to in the Settlement Agreement was to be given to Defendants as shareholders of the Mini Grocery and Property, not as employees, and they should have received those salaries; and 3) Plaintiffs should be precluded from pursuing this action in light of the Settlement Agreement.

In opposition to Defendants' cross motion to dismiss and for specific performance, Plaintiffs' Counsel provides a copy of the transcript of proceedings before the Court on March 2, 2012 (Ex. C to Schlesinger Aff. in Opp.). During those proceedings, Plaintiffs' counsel advised the Court that he is "happy" to withdraw his notice of rejection with respect to Defendants' cross motion (*id.* at p. 3) and that he worked out with Defendants' counsel a briefing schedule that contemplated the following: 1) Defendants have agreed to withdraw the part of their cross motion that addresses the sale of the Property; and 2) the parties agreed to enter into a stipulation in which the Defendants will agree not to seek to enforce any prior agreement with respect to the sale of the Property and/or interfere with the sale of the Property so the parties may enter into a redemption agreement that was contemplated by the Court under the application by the Receiver (*id.*). Plaintiffs' Counsel advised the Court that what remains for the Court to decide is the motion to dismiss and the portion of the cross motion that does not address the sale of the Property. Defendants' Counsel confirmed that Defendants agreed to withdraw that part of the motion that sought to enforce the purchase sale agreement dated in 2009, and to proceed with the stock redemption agreement (*id.* at p. 4).

Plaintiffs' Counsel provides a copy of a letter from Plaintiffs' Counsel to Defendants' Counsel dated April 5, 2012 (Ex. D to Schlesinger Aff. in Opp.). In that letter, Plaintiffs' Counsel requested that Defendants formally withdraw their cross motion to dismiss, and for

specific performance, in light of Defendants' failure to timely move to dismiss a claim based on *res judicata* and/or collateral estoppel, citing CPLR § 3211(e) and noting that Defendants answered the Complaint on or about September 6, 2011. Plaintiffs' Counsel also advised Defendants' Counsel in the letter that Defendants' cross motion for specific performance sought an equitable remedy even though Defendants' claim is "clearly compensable by money damages." Thus, Plaintiffs' Counsel maintained, Defendants' cross motion is frivolous. Plaintiffs' Counsel advised Defendants' Counsel that if Defendants failed to withdraw their cross motion by April 10, 2012, Plaintiffs would seek sanctions against Defendants, including costs and attorney's fees.

Plaintiffs' Counsel provides a copy of the Limited Releases dated July 22, 2009 (Ex. E to Schlesinger Aff. in Opp.). In those Limited Releases, the parties released each other from claims based on "any act, omission, matter, cause or thing which comprise the causes of action asserted in [prior lawsuits among the parties assigned Nassau County Index Number 21312-08 and Queens County Index Number 3834-09]." ² The Releases provide further:

This Release shall not affect in any respect whatsoever the right of one (1) or more shareholders to bring an action for judicial dissolution of [the Mini Grocery and/or the Property] in the event that the assets of the aforesaid corporations are not sold within one (1) year of the Settlement Agreement, dated July 22, 2009, and executed concurrently herewith. This Release does not affect the rights and obligations of the parties under the Settlement Agreement or any document or Exhibit annexed thereto.

The Receiver affirms that a Stock Redemption Agreement dated April 13, 2012 (Ex. C to Zucker Aff.) was entered into pursuant to which Defendants' ownership interest in the Property will be redeemed upon the consummation of the Stock Redemption Agreement. As set forth in the Stock Redemption Agreement, this transaction shall close within sixty (60) days from the date of the Stock Redemption Agreement.

The Receiver affirms that, in light of the fact that the property is going to be promptly sold, it appears that the only remaining issues involve whether the shareholders have derivative

² Defendants have provided copies of the Stipulations of Discontinuance filed in the Prior Actions (Exs. 3 and 4 to Song Aff. in Opp./Supp.).

or individual claims against each other for alleged wrongdoing. The Receiver takes no position on those issues.

With respect to the Mini Grocery, the Receiver affirms that he was advised by brokers that the grocery store had no value because it did not have a lease. Thus, a prospective purchaser would be reluctant to purchase the grocery store out of concern that he might be evicted shortly thereafter. Plaintiffs' counsel advised the Receiver that the Mini Grocery has ceased operations and provided the Receiver with statements relating to the assets and liabilities of the Mini Grocery (Ex. E to Zucker Aff.). The Receiver submits that, to determine the nature of the remaining assets and liabilities of the Mini Grocery, the parties and Receiver should review documents responsive to the Receiver's requests (*id.* at Ex. F). The Receiver contends, further, that if the Mini Grocery is no longer operational, the only remaining issue is the derivative and individual claims, if any, by the shareholders against other shareholders.

The Receiver notes that the parties have stipulated, and the Court has directed, the sale of the Property. The Receiver also affirms that although "it appears" that the parties stipulated, and the Court has directed, the sale of the Mini Grocery, this has not occurred (Zucker Aff. at ¶ 9). The Receiver submits that if the Mini Grocery has in fact ceased operations, the issues relating to the dissolution and/or liquidation of the companies would appear to be moot and the only remaining issues involve the shareholders' claims against other shareholders.

C. The Parties' Positions

Plaintiffs submit that Paragraph 9 of the Settlement Agreement "unequivocally provides" (Ps' April 13, 2012 Reply Memo. of Law at p. 1) that all shareholders shall receive a salary as an employee of the Mini Grocery, and contend that Defendants were no longer entitled to receive a salary following Raj's termination of their employment. Moreover, Pratap's "new position" (*id.*) that he was entitled to a salary as a shareholder, not as an employee, belies his claim for back salary because only "employees" are entitled to a salary under the Settlement Agreement. Plaintiffs submit that Defendants cannot nullify the vote cast at the meeting by the board of directors of the Mini Grocery because the board validly voted to terminate Defendants as directors and officers of the Mini Grocery. The individual Plaintiffs collectively hold 57.5% of the issued and outstanding shares of the Mini Grocery, as Pratap is the owner and holder of

22.5% of the voting shares and Udaysinh is the owner and holder of 20% of the voting shares.

Plaintiffs also contend that paragraph 12 of the Settlement Agreement requires the parties to dissolve the Mini Grocery and, therefore, the Court should issue an Order dissolving the Mini Grocery and dismissing Defendants' counterclaims as a matter of law. Paragraph 12 of the Settlement Agreement does not, as Defendants suggest, require the sale of the Mini Grocery prior to an application for dissolution. Plaintiffs note that the limited releases (Ex. E to Schlesinger Aff.) explicitly permit an application for dissolution one year after the Settlement Agreement in the event the assets of the Mini Grocery are not sold. Plaintiffs also argue that the Limited Releases only apply to claims or causes of action that were the subject of the Prior Actions and, as Plaintiffs' claims in the Instant Action arise out of Defendants' conduct following the execution of the Limited Releases and dismissal of the Prior Actions, Plaintiffs may pursue their claims against Defendants for breach of their fiduciary duties.

Plaintiffs also contend that Defendants' reliance on a Term Sheet that has expired "should not be countenanced" (Ps' April 13, 2012 Reply Memo. of Law at n. 4). The Term Sheet required the parties to close no later than May 25, 2011 but Defendants refused to close without justification. Plaintiffs characterize it as "ridiculous" (*id.*) for Defendants to rely on the Term Sheet which, if in effect, supersedes the Settlement Agreement and is at odds with Defendants' claims for back salary.

Plaintiffs also argue that the Court should deny Defendants' motion to disqualify Leon and Jaspan Schlesinger in light of the fact that 1) the disciplinary rules on which Defendants rely have been repealed; 2) disqualification pursuant to Rule 3.7 is inappropriate because Defendants have failed to demonstrate how Leon's, or Jaspan Schlesinger's, representation of Plaintiffs is prejudicial to Defendants; 3) any testimony regarding the purported issues would be cumulative of the Plaintiffs' testimony and, therefore, would not be necessary, particularly because counsel did not participate as an acting board member voting at the meeting; 4) Plaintiffs would be prejudiced in light of Defendants' lengthy delay in making this application; 5) even if the Court were to disqualify Leon, it need not disqualify Jaspan Schlesinger; and 6) dual representation of the companies and individual Plaintiffs is not prohibited as they do not have different interests. Plaintiffs also argue that Defendants' cross motion for sanctions is frivolous.

Defendants submit that a logical reading of paragraph 12 of the Settlement Agreement compels the conclusion that the sale of the two entities must be completed prior to the dissolution of the entities, as demonstrated by the requirement that the parties file a final tax return, which cannot be accomplished until the sale of the two entities is completed. Defendants contend that Plaintiffs' representation to New York State that the Mini Grocery is no longer in business, and their creation of new corporate entities, is inappropriate in light of the agreements among the parties.

Defendants also argue that paragraph 9 reflects the parties' agreement that Defendants are to be paid a salary of \$725 per week as shareholders until the Mini Grocery is sold. Defendants contend that the actions taken at the meeting held on July 13, 2010 were invalid because the required quorum was not present. Defendants contend that the agreement in effect is a February 18, 2011 Term Sheet executed by all shareholders of both corporate entities.

Defendants contend that their cross motion to dismiss on the theories of collateral estoppel and *res judicata* is not barred in light of the fact that Defendants, after issue was joined, requested the Court's permission to convert the motion to dismiss pursuant to CPLR § 3211(a)(5) to a summary judgment motion pursuant to CPLR § 3212 (*see* Ex. 1 to Song Aff. in Supp./Opp.). Defendants also contend that their cross motion is not frivolous, as it has substantive support and was not brought to delay or prolong this litigation. Defendants also argue that the Court should disqualify Leon and Jaspan Schlesinger in light of the fact that they were present at the July 13, 2010 meeting and "are the only third parties who may testify as to what actually happened" at the meeting (Song Aff. in Supp./Opp. at ¶ 27), and performed other relevant acts, including calling for the annual and special meeting for both corporations.

RULING OF THE COURT

A. Relevant Contract Principles

A contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed. *Highland Sand & Gravel, Inc. v. Squicciarini*, 272 A.D.2d 375, 376 (2d Dept. 2000), quoting *Morlee Sales Corp. v. Manufacturers Trust Co.*, 9 N.Y.2d 16, 19 (1961). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical

interpretation to the language employed and the parties' reasonable expectations. *Willsey v. Gjuraj*, 65 A.D.3d 1228, 1230 (2d Dept. 2009), citing *Franklin Apartment Associates, Inc. v. Westbrook Tenants Corp.*, 43 A.D.3d 860 (2d Dept. 2007), quoting *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Lobacz v. Lobacz*, 72 A.D.3d 653, 654 (2d Dept. 2010), citing *Willsey v. Gjuraj, supra*, at 1230, quoting *Greenfield, supra*, at 569. A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion. *Greenfield v. Philles Records, Inc., supra*, at 569, quoting *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978), *rearg. den.*, 46 N.Y.2d 940 (1979). If the contract, on its face, is reasonably susceptible of only one interpretation, the contract is unambiguous and the court is not free to alter the contract to reflect its personal notions of fairness and equity. *Greenfield, supra*, at 569-570.

B. Frivolous Conduct

22 NYCRR § 130-1.1(a) authorizes the court, in its discretion, to award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Section 130-1.1(c) provides that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

C. Disqualification of Counsel as Potential Witness

Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence. *Wolfson v. Posner*, 57 A.D.3d 979, 980 (2d Dept. 2008), quoting *S & S Hotel Ventures Ltd. Partnership v. 777 S. H.*

Corp., 69 N.Y.2d 437, 445-446 (1987) (citations omitted). A party's entitlement to be represented in an ongoing litigation by counsel of his own choosing is a valued right that should not be abridged absent a clear showing, on which the party seeking disqualification carries the burden, that counsel's removal is warranted. *Id.*, quoting *Goldstein v. Heid*, 52 A.D.3d 471, 471-472 (2d Dept. 2008). In *Wolfson*, the defendants maintained that plaintiff's attorney, and members of his firm, were necessary witnesses for the plaintiff in the legal malpractice action at issue. *Id.* The Second Department affirmed the trial court's order denying defendants' motion to disqualify plaintiff's attorney, and his law firm, from representing plaintiff on the grounds that plaintiff's attorney had knowledge of the underlying litigation from which the allegations of legal malpractice arose. *Id.* at 979.

D. Application of these Principles to the Instant Action

The Court grants Plaintiffs' motion for specific performance of the Settlement Agreement, and denies Defendants' cross motion for specific performance of the Settlement Agreement, based on the Court's conclusion that the language of the Settlement Agreement reflects the parties' intention that 1) the two entities at issue be dissolved; 2) Raj had complete discretion to determine who should remain as an employee and, therefore, to fire Defendants; and 3) there is no support in the Settlement Agreement for Defendants' argument that a distinction was to be drawn between Defendants' compensation in their role as shareholder as opposed to their role as employee. In addition, Defendants have not provided support for their contention that the meetings were conducted improperly and, therefore, the decisions made at those meetings are invalid. In light of these determinations, the Court directs that the Mini Grocery is dissolved. The Court directs the parties to provide the Receiver, on or before August 16, 2012, with the documents set forth in Exhibit F to the Receiver's Affidavit, which contains "a list of documents that the Receiver would like to review pertaining to Bayside Mini Grocery." The Court also dismisses Defendants' counterclaims, which rest on premises that the Court has now rejected. The Court also determines that, in light of the language of the Releases, Plaintiffs may pursue their claims to the extent they are based on Defendants' allegedly improper conduct following the execution of the Limited Releases and dismissal of the Prior Actions.

The Court denies Plaintiffs' motion, and Defendants' cross motion, for sanctions in light of the heavily contested nature of this litigation and the Court's conclusion that the arguments of the parties have not been propounded merely for delay. The Court denies Defendants' cross motion for disqualification of Michael Leon Esq., or the Jaspán Schlesinger Firm, in part because of the lateness of the application, and in part because there exist other sources, specifically the parties, who can provide relevant testimony regarding the matters that form the basis for the disqualification motion.

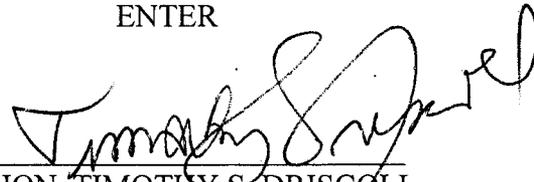
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The conference scheduled before the Court on July 18, 2012 at 9:30 a.m. is hereby adjourned to August 21, 2012 at 9:30 a.m.

DATED: Mineola, NY
July 3, 2012

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

JUL 17 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**