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Joseph Collins, Plaintiff v. Telcoa International Corp., Defendants, 23796/97

Justice Martin J. Schulman
23796/97
12-09-2010

Cite as: Collins v. Telcoa International Corp., 23796/97, NYLJ 1202475831618, at *1 (Sup., QU, Decided November 5, 2010)

Referee Leonard Livote

Decided: November 5, 2010

Additional Defendants

Telcoa New York Corp., Central Station Signals, Inc., Robert Dolin and Barry M. Lasky

ATTORNEYS

Attorneys for the Plaintiff: By: Edward G. Bailey, Esq., Bailey & Sherman, P.C., Douglaston, New York

Attorneys for the Defendants: By: Martin P. Unger. Esq. And Yale Pollack, Esq. (also present), Certilman, Balin, Adler & Hyman, LLP, East Meadow, New York

The following papers numbered 1 to 3 read on this motion by the Plaintiff for an order to confirm the report of the Referee Leonard Livote, dated December 16, 2009

PAPERS: Notice of Motion-Affidavits-Exhibits, NUMBERED: 1-3

To: The Honorable Martin J. Schulmann, TSP Part, Presiding:

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Upon the foregoing papers, it is hereby ordered that this motion by the plaintiff which seeks to confirm the report of the Referee Leonard Livote, dated December 16, 2009 is granted, without opposition.

When a Referee's findings are substantially supported by the record, the report should be confirmed, and the court should adopt the recommendation made therein. See, e.g., Bd. of Trustee of Maha Lakshimi Mandir v. Dubey, 56 AD3d 504.

The plaintiff is directed to settle a Judgment on notice in accordance with the Recommendations made by the Referee in the report.

The movant is directed to serve a copy of this order with Notice of Entry upon counsel for the defendants.

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By order of reference to hear and report this matter was referred to Judicial Hearing Officer (JHO) Sydney Leviss (now deceased) to hear and report on all issues to the Hon. Martin J. Schulman, Presiding Justice in the TSP Part. The matter was subsequently re-assigned and referred by the JHO/Referee Clerk to the undersigned Court Attorney/Referee to fix times for the taking of testimony and report proposed findings of fact and conclusions law.

The parties to this proceeding appeared before the undersigned for hearing and the taking of testimony on four days, commencing on September 27, 2007 and continuing on September 28, October 2 and concluding on October 3, 2007. Each of the parties was represented by counsel as set forth above and each party remained so represented throughout the proceedings. The plaintiff John Collins, the defendants Robert Dolin and Barry M. Lasky testified at the hearing. Depositions transcripts were read into the record. The complete transcription of the hearing accompanies this report.

The parties were afforded an opportunity to submit post hearing memoranda of law as well as proposed findings of fact and conclusion of law. The post hearing memoranda and other submissions also accompany this report as well as a number of documents (exhibits) which were admitted into evidence.

In addition to testimony I have taken notice of the Queens County Clerk's file which contains prior pre-trial court decisions and papers filed by the parities to this action.

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The Parties to the Action

Plaintiff John Collins was a shareholder, officer and director of defendant burglar and fire alarm companies Telcoa International Corporation, (hereafter "TIC"), Telcoa New York (hereafter "TNY") and Central Station Signals, Inc. (hereafter "CSSI"). Defendants Robert Dolin and Mortimer Krell (now represented by his personal representative Rita Krell) along with plaintiff were also shareholders officers and directors of these companies. Defendant Barry M. Lasky was counsel for TIC, TNY and CSSI. AlarmGuard Holdings. Inc and AlarmGuard Inc. which are no longer parties, purchased TIC, TNY and CSSI for $4.2 million in June 1997. The actions against the other remaining defendants in the original caption were discontinued.

Background

'This dispute involves the sale of assets of three fire and burglar alarm companies. TIC, TNY and CSSI were sold to AlarmGuard Holdings Inc. and/or AlarmGuard, Inc in 1997 for a value of $4.2 million. Plaintiff alleges, inter alia, that he is a victim of a fraudulent stock transfer orchestrated by defendant Robert Dolin. Plaintiff seeks an equitable distributive share of the proceeds of the sale of the assets of these three corporations. He also seeks, common-law dissolution, payment of fair value money damages for his stock ownership and money damages for breach of fiduciary duty. Furthermore, the plaintiff seeks damages regarding the alleged wrongful issuance of additional shares of the publicly traded corporation TIC which allegedly diluted his percentage of ownership of that

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corporation. The Plaintiff also seeks damages for the denial of the right to exercise an option contract to buy more shares; damages for conversion of his share of the proceeds of the sale; and finally, damages for breach of fiduciary duty by the corporation's counsel in failing to advise that the impending

sale of corporate assets required statutory notice.

Defendants generally deny these allegations asserting affirmative defenses that plaintiff is a minority shareholder and otherwise lacks standing for the relief sought; claim that his exclusive remedy is for an appraisal; that an AAA award is res judicata regarding the option contract; that the corporation's counsel is not liable since he is not an officer or director.

Defendants also claim at trial that plaintiff misappropriated corporate opportunities while still employed, that he was not subject to a freeze out of the sale of corporate assets as claimed, but instead voluntarily terminated his employment and began directly competing for business with TNY and CSSI. Finally, since the stock transfer sale has already occurred much of what plaintiff requests of the court is either moot or otherwise non justiciable.

The Pleadings

The issues heard in this hearing and report are contained in Plaintiff's second amended complaint and answer to second amended complaint.

The second amended complaint (originally consisting of thirteen causes of action) presents eleven surviving causes of action. Plaintiff John Collins is a dissenting

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minority (5 percent) shareholder in two closely held corporations and a 10.3 percent shareholder in a publicly traded corporation which owned 85 percent of the closely held corporations.

Plaintiff, in cause of action one (1) seeks judicial dissolution of TNY and CSSI and/or payment of fair value as well as appointment of a court appointed receiver; in cause of action two (2) plaintiff alleges that the sale of the Telcoa's assets were without notice to plaintiff and defendants breached their fiduciary duties to plaintiff and accordingly seeks permanent declaratory and injunctive relief against all defendants; in cause of action three (3) plaintiff seeks to set aside the Purchase and Sale Agreement and the sale of the Telcoa assets alleging that the sale was without notice to plaintiff as well as without a fair and equitable distribution to Collins; in cause of action four (4) Collins alleges breach of fiduciary duty to Collins and acts of minority oppression, and as a result seeks damages in excess of $1 million together with punitive damages; in cause of action five (5) plaintiff seeks personal liability damages and punitive damages against defendant Dolin for acts of minority shareholder oppression, self-dealing and fraud; in cause of action six (6) plaintiff seeks actual damages of $92,000 as well as other and punitive damages alleging that there was a dilution of approximately 22 percent of his interest by the defendants issuance of 1.4 million additional shares of Telcoa International without a valid corporate purpose, constituting corporate waste and mismanagement and without TIC receiving fair consideration for said additional shares; in cause of action seven (7) plaintiff seeks damages of $136,360 alleging breach of an option contract to purchase an additional 150,000 shares of TIC; cause of action

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eight (8) was withdrawn; in cause of action nine (9) plaintiff alleges actual and punitive damages for conversion of his respective percentage of the proceeds derived from the sale of the Telcoa assets by defendants; in cause of action ten (10) as a result of alleged acts of corporate neglect, waste and violations of duties committed by defendant Dolin plaintiff seeks an accounting; in cause of action eleven (11) plaintiff seeks damages against defendant Lasky for professional malpractice, negligence, breach of contract and fiduciary duty by attorney; in cause of action twelve (12) plaintiff seeks damages

against defendants Dolin, Lasky and Krell jointly and severally for conspiracy by aiding and abetting each other in a plan to benefit themselves at the expense of Collins; cause of action thirteen (13) was withdrawn.

It should be noted that the plaintiff at the hearing also seeks compensation for attorneys fees but same is not contained in his complaint.

Defendant's answer essentially generally denies these allegations and asserts ten (10) affirmative defenses. Among them are affirmative defenses stating, (1) that the complaint fails to state cause of action upon which relief may be granted; (2) the publicly held corporation sale had already occurred rendering enjoining said sale non justiciable; (3) plaintiff assigned his shares in the publicly held corporation to defendant with a signed stock power and certificate; (4) defendant offered plaintiff a valuation price for shares but it was rejected; (5) plaintiff as a minority shareholder has no right to seek statutory dissolution; (6) unless a distribution is declared a shareholder has no right to a share of the

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assets of sale; (7) defendants alleged breach of an option contract is res judicata due to an American Arbitration Award; (8) since defendant Lasky is not an owner, officer of director of any of these companies no relief can be sought against him; (9) defendant's exclusive remedy was to seek an appraisal therefore no injunctive relief can be granted; and finally (10) since plaintiff is not a creditor of any of the companies he has no standing to seek an accounting.

Findings of Fact

Plaintiff Joseph E. Collins ("Collins") was a five percent (5 percent) shareholder of two closely held New York Corporations engaged in the burglar and fire alarm businesses, to wit, TNY and CSSI as well as a 10 percent shareholder in publicly held TIC. Defendant Robert Dolin and now deceased former defendant Mortimer Krell were also the holders of five percent (5 percent) interests in TNY and CSSI. The remaining eighty five percent (85 percent) of TNY and CSSI was owned by TIC, a public company in which Mr. Dolin was the controlling shareholder (holding approximately 65 percent of TIC's shares). Plaintiff joined the Telcoa companies in 1988. He had experience in the alarm business dating back to the 1960's. TIC at that time had residential accounts in Connecticut and Westchester County, and Mr. Dolin wanted to expand his business by entering into the New York City industrial — commercial market.

Upon joining Telcoa, Collins implemented the construction of a central station facility in Mount Vernon, New York — this central station was certified by ULL

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(Underwriters Laboratories) as well as the New York City Fire Department ("FDNY"). The construction of the new central station benefited TIC because it no longer had to pay a third party to monitor its residential accounts. Collins oversaw the operation of the central station facility and was in charge of all fire alarm sales in New York City. Defendant Krell was in charge of the Bronx burglar alarm sales and Collins was in charge of the other boroughs. Starting in 1988, TNY's operations grew, with $2.5 million in annual sales and $1.8 million in annual recurring revenue by 1995. Collins built the New York Company into the most profitable of the Telcoa companies. The monthly recurring revenue (MRR) of TNY was twice that of TIC and four times greater than CSSI. TIC also offered Collins an option to purchase an additional 150,000 shares of TIC stock.

By 1995, with Mr, Krell seriously ill and Dolin at 73 years of age, Dolin wanted to sell the Telcoa companies. Mr. Dolin engaged in discussions in 1995 with a potential buyer, AlarmGuard Corporation with its principal, Mr. Russ MacDonnell, accepting a $10,000 deposit toward a sale. Mr. Dolin discussed the idea of a sale with Mr. Collins and arranged a meeting between Collins and MacDonnell. At this meeting MacDonnell offered Collins stewardship of the post-closing entity but made clear that as a pre-condition Collins would have to sign a non-solicitation agreement (also referred to at trial as a "non-compete" agreement) with AlarmGuard. The document form of the non solicitation agreement was shown by Collins to his counsel and Collins expressed his concern to Dolin that Collins would effectively be barred from the mainstay of his livelihood, which was the alarm

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business for five (5) years should his employment with AlarmGuard not work out for any reason. That was an unacceptable pre-condition for Collins.

Subsequently, Dolin called a meeting in the Mount Vernon office on October 13, 1995 to discuss the sale to AlarmGuard. At this meeting Dolin accused Collins of potentially ruining the prospective sale by refusing to sign the non solicitation agreement and thereafter threatened termination. Defendants claim that Collins thereafter "voluntarily" resigned, however, Dolin made the signing of a five year non solicitation agreement as presented a necessary condition precedent to his continued employment. Having refused to sign the agreement, Collins was forced to turn in his company car keys and cell phone, effectively terminating Collins' employment.

After the dispute over the signing of the non solicitation agreement Dolin continued with further efforts to sell the Telcoa companies. After at least two other prospective offers fell through, in 1996 discussion with AlarmGuard resumed once again. On June 20, 1997, the assets of the Telcoa companies were sold to AlarmGuard for a purchase price in excess of $4.2 million, payable in two installments, as follows: (a) $2.1 million at closing in the form of $1.6 million in cash and the balance in the form of AlarmGuard stock; and (b) $2.1 million (approximately) payable one year later in the form of AlarmGuard stock, the exact amount to be adjusted according to customer retention. Collins on the other hand received nothing.

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Collins was not given notice of and did not attend the corporate meetings of TNY and TIC where the sale votes were taken; TNY was the more valuable of the two Telcoa companies based upon the AlarmGuard — Telcoa sale documents and Collins proved that he had built TNY into a more profitable company. Collins did attend a shareholder's meeting of CSSI but abstained from voting on the proposed sale because insufficient financial data was presented to him and he felt he was not informed enough to make an intelligent vote.

Defendants claim that based on Lasky's legal advise to Dolin, Collins waived statutory notice, voting rights and entitlement to thousands of dollars because many years earlier he had pledged $2,500 for all of his TNY stock as collateral with a stock power certificate in favor of Dolin. The undersigned finds this defense without merit. Defendants would have the Court uphold a previously overlooked stock power certificate based on a mere $2,500 loan as collateral, as an equitable and proper basis for waiver of notice and all voting rights on TNY stock. Under an ordinary arms length sales transaction perhaps defendants might wish to make a showing of good faith, but it could not survive the higher duty owed in a fiduciary relationship. It should be further noted that no mention of the stock power certificate was

raised in the first sale negotiations with AlarmGuard in 1995. There was no promissory note or other evidence to support the Defendants's claim.. To further contradict the validity of said claim Collins is expressly cited at section 8.3 in the

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AlarmGuard Purchase and Sale Agreement as it was fully intended that he was a stockholder with voting rights.

As stated, after the sale to AlarmGuard of the Telcoa companies, Collins was paid nothing for his shareholdings and other interests. (Defendants later defend that at trial "fair value" of $100,000 was offered to Collins but rejected. The undersigned finds that $100,000 was not "fair value" and was properly rejected.) Dolin on the other hand received an immediate $400,000 in value (cash and stock) and Krell received $200,000 in value (cash and stock) from the first half of the AlarmGuard proceeds. Telcoa received 288,616 AlarmGuard shares in June 1998 valued at $7.00 per share as the second half of the AlarmGuard purchase price. Around the same time, TYCO International made a tender offer for AlarmGuard at $9.25 per share. Telcoa accordingly tendered all its' AlarmGuard shares to TYCO resulting in Telcoa receiving a total of $3,363,901.20 in cash by 1999. Dolin thereafter moved to Florida with the Telcoa sale assets. Thereafter, the second half of the AlarmGuard purchase price was issued to TNY and CSSI. Dolin has issued no reports to TIC's shareholders, and has held no meetings since the AlarmGuard sale the Telcoa companies are essentially inactive.

Mr. Dolin also caused to be issued additional shares in TIC stock as the AlarmGuard sale closed, as follows: (a) 422,000 shares to Joyce Dolin, (defendant Robert Dolin's wife) and (b) 150,000 shares to Krell and another 850,000 shares to himself, Robert Dolin. Mr. Dolin also received other benefits such as continued employment, for himself and

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his family, health and life insurance and pension benefits, a cart allowance, an expense account, and an office. After the sale, Collins did not receive any benefits for his interests. Telcoa did not pay commissions due and owing.

To recover unpaid commissions Collins commenced an arbitration before the American Arbitration Association seeking compensation for commissions still unpaid and owed to him. The Arbitration was held on or about September 1996 and resulted in a net award to Collins for $229,568 for unpaid commissions compensation. The original award of $271,332 to Collins was reduced by the granting of a counter claim in favor of TIC in the amount of $41,864 for Collins's misappropriation of corporate opportunities. The award was not paid out of corporate money. The undersigned then received hearing testimony that since TIC did not have the capital to pay the AAA award to Collins it instead took a loan through Robert Dolin's wife, Joyce Dolin. Joyce Dolin raised the money by placing a mortgage on her principal residence (deeded in her name only), even though she lived there in an intact marriage with her husband. The loan was secured by a writing that there would one share in exchange for each $1.00 of loan given. The Telcoa companies, without Collins knowledge then issued Joyce Dolin 270,000 shares of TIC stock as collateral for the loan (which was part of the 422,000 shares issued to her, supra) as payment for the loan.

The undersigned further received hearing testimony that there were numerous lawsuits brought against Collins by the defendants and that Mr. Collins has expended $357,000 in legal and other fees. There was also testimony that in a prior proceeding the

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Supreme Court, Queens County (J. Golar), had ordered Defendants to put $400,000 in an escrow account to secure plaintiff's claims pending the outcome of the litigation. Defendants failed to keep an accounting of the escrow proceeds and have invaded the interest on the escrow account without court permission to pay bills.

Barry M. Lasky was the lawyer for Collins individually in Telcoa New York Corp v. Uneeda Check Cashing Inc. Index No. 20576/92 — Sup. Ct. Westchester Co. This litigation was pending litigation at the time of the Telcoa — AlarmGuard sale. Lasky also represented Collins' interests as counsel to the closely held corporations. Collins had originally introduced Lasky to Dolin. Lasky represented the defendant Corporations in a series of lawsuits alleging unfair competition by Collins which were all dismissed. Lasky also represented Telcoa in the sale to AlarmGuard. Lasky received a legal fee of $110,00 for his legal work for Dolin on the Telcoa to AlarmGuard sale. Said sale was not only without notice and in violation of law, but Lasky also advised Dolin that it would be permissible not to pay Collins his distributive share because he "quit." And/or that he waived notice by pledging his stock as collateral for a loan.

Conclusions of Law

The Plaintiff at the hearing has sustained his cause of action for common-law judicial dissolution and/or payment to him personally of an equitable distributive share of the proceeds of sale of the Telcoa companies to AlarmGuard for $4.2 million. The plaintiff has

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not sustained his request for the appointment of a receiver. The companies have been in-active for years.

Pursuant to Liebert v. Clapp, (13 NY2d 313, 247 NYS2d 102 [1963]) the plaintiff has a right to common-law dissolution of a corporation where the officers or directors of the corporation are engaged in conduct which violates their fiduciary duty to the minority shareholders. (id.; Collins v. Telcoa International Corp., 283 AD2d 128 (2001); Lewis v. Jones, 107 AD2d 931(1985).)

The defendants Dolin and Krell as directors and majority shareholders of the Telcoa companies had an obligation to all shareholders to adhere to fiduciary standards of conduct for the protection of all shareholders and to exercise their responsibilities in good faith when undertaking any corporate actions including a merger. (Id.) Defendants enriched themselves with the proceeds of the sale and many other benefits at the exclusion of Mr. Collins, and thereby violated their fiduciary duty owed Mr. Collins. The undersigned recommends that the Court find that the sale and merger of the Telcoa Companies to AlarmGuard was without proper notice, unlawful, egregious and that an action for the equitable relief to make Collins whole is authorized. (See, Albert v. 28 William St Corp., 63 NY2d 557 (1984.); Kruger v. Gerth, 22AD2d 916 (1964.))

The undersigned further recommends that the Court find that the plaintiff was not duly informed (as mandated by statute) of the proposed sale of the Telcoa companies' assets pursuant to NYS Business Corporation Law (BCL) section 909(a). It is respectfully

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submitted that this fact has not only been proven by plaintiff in the hearing testimony but is also the law

of the case as held by the Appellate Division, Second Department. (See, Collins v. Telcoa International; id.) "Certainly if he (Collins) were duly apprised of the sale he would have opposed it." (Id.)

As stated by the Appellate Division, Second Department, in Collins v. Telcoa, "...it is equally clear that the Plaintiff's opposition to the sale would have been futile and his only remaining remedy would have been to commence a proceeding pursuant to Business Corporation Law (BCL) section 623 to obtain fair value of shares which he has done here." (Id.)

Generally, a dissenting shareholder who brings a proceeding pursuant to BCL section 623 to have his or her shares appraised, may not also commence either an individual or derivative action for money damages because to do so would be unnecessarily duplicative. (See, Collins v. Telcoa International Corp, id.; citing, Breed v. Barton, 54 NY2d 82 (1981).) The Appellate Division noted that since Plaintiff did not opt for an appraisal proceeding pursuant to BCL section 623, he is not foreclosed from maintaining the within individual cause of action for common-law dissolution and money damages.

Payment of fair value as well as common-law dissolution is a suitable remedy since the assets of the Telcoa companies have long since been sold without Collins having received fair value for the sale. Telcoa's collective actions, including terminating Collin's employment and selling the corporation's assets without notice to him of meetings constitutes

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a minority shareholder freeze out and oppression of a minority shareholder. Based upon the foregoing, Collins is entitled to an award for an equitable distributive share representing "fair value" for his shareholdings and other benefits and interests of the TNY and CSSI sale.

The AlarmGuard sale was for $4.2 million in cash and stock which defendant Dolin received a first payment of $400,000 (cash and stock) and Krell received a first payment of $200,000 (cash and stock). The sale transaction when looked at as a whole was as a result of breaches of fiduciary duties owed. The end result of no distributive share ever being paid was patently unfair and unjust to Collins. (Id.) Collins is not only entitled to his equitable share of 5 percent in TNY and CSSI, but should also be reimbursed for equitable compensation for 150,000 additional shares of stock that both Dolin and Krell received but Collins did not. Furthermore, Collins is entitled to equitable compensation for an additional 150,000 shares of stock due to a corporate board resolution in 1994, bringing a total of 300,000 shares. (The Court is not bound by a prior AAA award.) Such compensation should be with prejudgment interest. The amount of damages for breach of fiduciary duty has been held to be the amount of loss sustained including lost opportunities by reason of the defendant's conduct. (See, Duane Jones Company Inc. v. Burke, 306 NY 172 (1954).)

Collins was precluded from many of the benefits of the sale including a salary, secretary, car allowance, health insurance, and pension benefits. Additionally, Collins is entitled to the increase of stock value from the TYCO tender offer of AlarmGuard stock as well. Furthermore, said compensation should include prejudgment interest. An award of

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prejudgment interest is "virtually mandated" where a fiduciary has failed to properly account for many years and has enjoyed the benefit of the injured party's money during that time. (Sexter v. Kimmelman, Sexter, Warmflash & Leitner, 43 AD3d 790 (2007).)

The undersigned further recommends that the Court further find that the defendants diluted the

plaintiff's percentage of ownership of Telcoa stock by the issuance of additional shares. Defendant Dolin issued additional shares to himself (defendant Robert Dolin), his wife Joyce Dolin, and defendant Krell. Such issuance of additional shares was done without a valid corporate purpose, namely without Telcoa and (thereby Collins as remaining shareholder) receiving fair consideration for said shares. (See, Collins v. Telcoa International Corp., supra.) The undersigned recommends that the Court find that the plaintiff has proven that stock had been issued to directors and others at an inappropriate price without affording the plaintiff the right to purchase his proportionate part of the shares. (See, Hammer v. Werner, 239 App Div 38 (1933).) Accordingly, Collins should be entitled to be compensated for the dilution of shares.

The undersigned recommends that the Defendant Barry Lasky should be held liable for breach of fiduciary duty to Collins to the extent that he did not advise Dolin to notify Collins of the pending sale of Telcoa to AlarmGuard as required by BCL section 909(a). Defendant Lasky also gave legal advice to Dolin, that since a $2,500 loan was pledged, it thereby constitutes a waiver of all of Collins' TNY stock. But for the security of this legal advice, Dolin may not have proceeded with the sale of Telcoa assets

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without a distributive share to Collins. (See, Weil, Gotshal and Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (2004).) In sum, Lasky violated his fiduciary duties to Collins.

The undersigned submits to that Court that the plaintiff has failed to prove entitlement to punitive damages. Punitive damages are usually reserved for intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive or a conscious act that willfully or wantonly disregards the rights of another. (Don Buchwald and Associates, Inc. v. Rich, 281 AD2d 329 (2001).) Plaintiff although clearly aggrieved here failed to meet that high threshold level of proof.

Recommendations to the Court

Plaintiff's first (1) cause of action: The undersigned recommends that the court find that plaintiff was a victim of a fraudulent stock transfer. Additionally, the Court should most respectfully grant common-law judicial dissolution of the Telcoa companies and payment of fair value for TNY and CSSI to Collins in the amount of $420,000.00 with prejudgment interest at 9 percent. (See, Matter of Joy Wholesale Sundries, Inc., 125 AD2d 310 (1986).) This award represents compensation for plaintiff's original 5 percent interest in both companies together with interest which acknowledges that the defendant's conduct deprived the plaintiff of the use and enjoyment of the money he was entitled to for many years. The undersigned further recommends that the court deny the appointment of a receiver.

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Plaintiff's second (2) cause of action: The undersigned recommends that the Court find that the sale to AlarmGuard was without notice to plaintiff and that the defendant's did breach their fiduciary duties to plaintiff, however, the relief requested is permanent declaratory and injunctive relief against inactive corporations and as to said relief the Court denies it as moot.

Plaintiff's third (3) cause of action: The undersigned recommends that the court find that the sale of Telcoa companies was without notice and without a fair and equitable distribution to Collins, however, the request to set aside the Purchase and Sale Agreement on said grounds should be denied as moot.

Plaintiff's fourth (4) cause of action: The undersigned recommends that the Court grant damages against defendant Dolin for breach of fiduciary duty and acts of minority oppression and freeze out

toward Collins in the amount of $400,000 with prejudgment interest at 9 percent. The plaintiff has shown that sale of the Telcoa companies to AlarmGuard for $4.2 million was based upon the strength of TNY. Plaintiff, in addition to compensation for his 5 percent interest in TNY and CSSI is also entitled to an equitable share of the profits, benefits and rewards of the $4.2 million sale. When there is a breach of fiduciary duty in the context of a freeze out corporate merger the focus is on whether the transaction, viewed as a whole was fair to all concerned. (Alpert v. 28 Williams Street Corp.; id.) Cases involving breaches of fiduciary duties are treated as a special breed of cases where the normally stringent rules for damages calculation are relaxed. (Gibbs v. Breed, Abbott &

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Morgan, 271 AD2d 180 (2000).) The Court is granted significant leeway as long as the court's methodology and findings are supported by inferences within the range of permissibility. (Veniselos v. Oceania Maritime Agency, Inc., 268 AD2d 291 (2000).) Furthermore, when difficulty in calculating damages is attributable to defendant's misconduct, a degree of uncertainty is tolerated. (Wolf v. Rand, 258 AD2d 401 (1999).) The Plaintiff has shown that Defendant's acts of misconduct were a substantial factor in causing him an identifiable loss. (Northbay Const. Co., Inc. Bauco Const. Corp 38 AD3d 737 (2007). In the within matter the plaintiff has proven that TIC had no New York business at all until he joined the companies. Collins introduced a central station into the business and built a client base. The plaintiff's hard work and expertise in the burglar and fire alarm field not only created a large customer list for TNY, but TNY grew into the most profitable of the three companies and the reason behind the favorable $4.2 million sale price. The monthly recurring revenue (MRR) of TNY was twice that of TIC and four times greater than CSSI. The breaches of fiduciary duty are serious and numerous. Defendants produced almost no accounting documents to support their position at trial. Instead of paying an arbitration award to plaintiff directly, they issued additional stock to defendant's wife Joyce Dolin as collateral for a mortgage loan on a residence where she lived together with her husband. Defendants claim that Collins waived all TNY stock voting rights and notices due to an old stock power certificate secured by a mere $2,500 loan, despite the fact that Collin's name was expressly recited in the AlarmGuard Purchase and Sale agreement. The defendants
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admitted "to paying bills" with the interest earned on the $400,000.00 escrow ordered by Justice Golar to secure Plaintiff's claims herein without the Court's permission. Defendants failed to keep financial records regarding the Court ordered escrow account They sent out no annual reports, accountings or financial statements of the Telcoa companies after the AlarmGuard sale. In addition, as a result of the merger transaction, defendants enriched themselves to the exclusion of the plaintiff with full-time salaries in AlarmGuard ($80,000 year to Dolin and $100,000 to Krell), offices in Florida, a full time secretary, car allowances ($200.00 per month), health insurance coverage ($626.28 per month), expense accounts and access to life insurance plans and pension benefits all to the exclusion of the Plaintiff. Certainly, plaintiff is entitled to just compensation for having been excluded for years from all of these many benefits. Finally, the plaintiff is also entitled to be compensated for the increase in value of stock. Due to the freeze out, defendants deprived plaintiff of the benefit of a subsequent tender offer by TYCO of all of TIC's AlarmGuard stock which increased the value of stock already owned from $7.00 to $9.25 share. The remaining branch of cause of action four (4) for punitive damages should be denied.

Plaintiff's fifth (5) cause of action based upon personal liability against defendants for acts of minority shareholder oppression, self dealing and fraud the undersigned recommends to the Court has been duly proven and should be granted, however, further damages for said relief would be duplicative as

they have already been covered by

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the damages granted elsewhere herein. The branch of the 5th cause of action for punitive damages should be denied.

Plaintiff's sixth (6) cause of action for dilution by the issuance of $1.4 million additional shares of Telcoa without a valid corporate purpose and without the corporation receiving fair consideration, the undersigned recommends that the Court grant actual damages of $92,000 as requested, but should deny relief for punitive damages.

Plaintiff's seventh (7) cause of action the undersigned recommends that the court award $150,000 with prejudgment interest at 9 percent representing equitable compensation for stock that he did not receive due to a breach of an option contract in a 1994 board resolution and that these damages are not bound by a prior AAA award..

Plaintiff's eight (8) cause of action is withdrawn.

Plaintiff's ninth (9) cause of action for conversion by Dolin of Collins's respective percentage of the proceeds derived from the sale the undersigned recommends that said cause of action be denied.

Plaintiff's tenth (10) cause of action for an accounting the undersigned recommends that the said cause of action be denied.

Plaintiff's eleventh (11) cause of action against defendant Lasky for professional malpractice, negligence and breach of fiduciary duty the undersigned recommends that said cause of action be granted for defendant Lasky's breach of fiduciary

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duty to a client owed as an attorney, and award damages of $110,000 with prejudgment interest at 9 percent.

Plaintiff's twelfth (12) cause of action for damages against Dolin, Lasky and Krell jointly and severally for conspiracy the undersigned recommends that this cause of action be denied.

Plaintiff's thirteenth (13) cause of action is withdrawn.

The undersigned further recommends that the plaintiff's request for payment of attorney's fees which was not pleaded be denied. The general rule is that a prevailing party may not recover attorney's fees except where authorized by statute, agreement, or court rule. (US Underwriters Ins. Co v. City Club Hotel, LLC, 3 NY3d 592[2004].)

The undersigned recommends that the Court deny any and all other or further relief or defenses not specifically mentioned or covered herein together with all affirmative defenses. Finally, the undersigned requests that upon a duly heard motion to the Court to confirm the within report and recommendations, that the Court order a final judgment be settled herein.

This constitutes the report and recommendations of the undersigned Referee.