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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. JOHN P. DUNNE,
Justice

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TRIAL/IAS PART 13
NASSAU COUNTY

ARTHUR J. KREMER, as Trustee of the
Testamentary Trust of the Will of
Bernard E. Goerler,

INDEX 97-034759

Plaintiff,

DECISION AFTER
NON JURY TRIAL

-against-

4-65 48TH AVENUE, INC., CREST GOOD
MANUFACTURING, INC., and
RONALD B. GOERLER,

Defendants.

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The above action was commenced as a shareholder's derivative action seeking an accounting pursuant to **Business Corp. Law §720** and was tried before this court as a non-jury trial. Upon the conclusion of the trial, the application by both counsel for time to submit post trial summations, motions and arguments was granted and the time to file was extended by consent of both counsel.

During the trial the plaintiff testified, together with Lanny Weissman, an accountant and Patrick Givens a real estate appraiser. The defendant in opposition submitted testimony from defendant Ronald B. Goerler and Michael Fitzgerald a real estate appraiser.

The parties stipulated and agreed that no testimony was necessary from the trustee, Arthur J. Kremer.

CAUSE OF ACTION

In an amended complaint, the Trustee contends that defendant Ronald B. Goerler as an officer and Board of Directors member of 4-65 and Crest Good failed to administer their affairs in a skillful, careful and diligent manner, and did not act honestly, wasted assets of both corporations and voted solely in his own interest since May 3, 1995. (Para. 19).

The Trustee in Para. 20, alleged six separate violations of his duties as an officer of 4-65 and Crest Good as follows:

20(a) 4-65 made an unsecured loan to Crest Good (a corporation controlled by Ronald B. Goerler as a majority shareholder) and failed to collect any interest as principal for periods of months; nor made any effort to collect or accelerate the loans.

20(b) 4-65 has rented property to an unnamed corporation controlled by Ronald B. Goerler and has neither received nor made any effort to collect rentals.

20(c) Properties owned by 4-65 are rented to corporations controlled by Ronald B. Goerler at rates far below fair market value.

20(d) In January, 1993, 4-65 significantly increased its liabilities by doubling a mortgage on property owned in Chattanooga, Tenn., and thereafter lending the net proceeds to Crest Good as an unsecured loan and has failed to collect any principal or interest on said loan.

20(e) 4-65 expended corporate funds improperly by paying expenses which should have been borne by tenants.

20(f) 4-65 and Crest Good improperly expended and wasted corporate assets for the

benefit of Ronald B. Goerler and his family.

The defendants raise five Affirmative Defenses.

- (1) The Plaintiff, Trustee, has no standing as to matters prior to May 3, 1995
- (2) Release and Discharge
- (3) Res Judicata
- (4) Business Judgment Rule
- (5) The action is barred as to matters prior to May 3, 1995

FACTS

Under the terms of the last will and testament of Bernard E. Goerler, who died in 1978, all of his assets devolved to his widow in trust. The trustees were his widow and son Ronald G. Goerler (RBG). Upon the death of his widow the assets of the estate substantially were distributed to RBG and in trust for the benefit of Clinton Goerler, (CG) a brother of Robert.

The trust assets consisted of the stock in two corporations; namely 4-65 48th Avenue Inc. (4-65) and Crest Good Manufacturing (Crest Good). 4-65 is a real estate holding company which owns and manages real estate in Chattanooga Tennessee; Syosset & Riverhead N.Y. Crest Good is a wholesale plumbing supply company.

RBG holds 71% of the shares of 4-65 and is a director and president of said corporation. The remaining 29% of 4-65 is held by plaintiff's trust. 4-65 owns 49% of Crest Good, the RBG Living Trust owns 35%, a family trust owns 14% and plaintiff's Trust 2%. RBG is likewise a

director and president of Crest Good. Clinton Goerler' individually owned shares of Crest Good and 4-65 were purchased by 4-65 and Crest Good and the monthly payments of \$15,000.00 per month due to Clinton Goerler are current.

In 1991 RGB purchased from his brother Clinton Goerler of his shares in Dyna Corp. making him the owner of 100% of the stock of Dyna. Moreover, Clinton Goerler at the same time resigned his offices as President, Treasurer and Director of Dyna. Furthermore, plaintiff's accountant conceded he was in error when he testified that 4-65 made new loans to Dyna.

The plaintiff contends that the real estate in Syosset which is owned by 4-65 is rented to corporations that are controlled by RBG and at rates far below market value. In support of its contention the plaintiff produced a real estate appraiser, Patrick Givens, who estimated the fair market value for rental by Savoy and Crest Good of the Syosset property was \$5.67 per square foot. The defendants real estate appraiser evaluated the fair market value to be \$3.43 per square foot. The defendant's appraiser had the opportunity to appraise the interior of the premises whereas the plaintiff's appraiser limited his inspection to the outside of the building. The defendant's appraiser appraised a greater amount of interior space as warehouse rather than office space, poor parking and ramp arrangement, insufficient air conditioning and, interior condition of the buildings..

Neither party produced any potential tenants which is the ultimate barometer on the question of rental values.

Courts, however, have no discretion to determine market value sua sponte and cannot bridge the difference. The court must elect to rely on one or the other appraiser. Here, the testimony established a more thorough appraisal by defendant's expert and finds the premises

market value to be \$3.43 per square foot. Therefore, the court does not find the rental on the Syosset property to be unfair or unreasonable.

In addition to rentals below fair market value the plaintiff contends that good business practice would require interest on rental arrears which was not included until May 2000.

4-65 purchased real estate in Chattanooga Tennessee in 1971 for \$150,000. In 1997 the property was refinanced by 4-65 at a slightly lower interest rate increasing the mortgage principal to approximately \$600,000. The original mortgage was paid off and part of the equity of \$235,000 approximately \$189,500 was loaned to Crest Good at 9½ % interest which rate is ½ of 1 % above the Tennessee loan. The only document regarding said loan to Crest Good is a demand note, Ex. 9. At the same time the loan of \$189,500 was made to Crest Good, it was in arrears on the rent to 4-65 in the amount of \$71, 225.

In response to the challenge by plaintiff that the various loans to Crest Good and Savoy were imprudent investments for 4-65, the defendant argues that the loans have been part of the corporate portfolio for some 30 years; that interest in the amount of 9½% has been paid on delinquent loans in the amount of \$278,654.98 over the past 8 years by Crest Good.

Savoy similarly has paid interest over this past accounting period in the amount of \$27,281.71 while the principle of the loan has increased from \$44,000 to \$48,000.

JAMESPORT

In July 1988 North House Vineyards purchased at a public auction land in Jamesport, Long Island, NY. The purchase price was \$565,000 and the acreage was deeded to North House Vineyards Inc., a corporation in which RBG had a controlling interest. The purchase price was

made as follows:

- (1) \$50,000 which RBG claimed was monies he had on deposit with 4-65.
- (2) Remaining \$515,000 by a check from 4-65.

Thereafter North House Vineyards deeded ½ of the property to 4-65. In addition, RBG endorsed a Note owed to him by A-1 Appliance in the amount of \$135,101 to 4-65 and a promissory Note for the balance.

The property consists of a farm house and a vineyard. The monthly rentals for the vineyard is \$750 while the farm house rentals vary from tenant to tenant.

Neither party has offered any testimony or reliable appraisals on the fair market value of rentals on the Jamesport property.

The plaintiff raises a question regarding a double payment of real estate taxes on the Jamesport property. The defendant response indicates by mistake the appropriate tax amount was not paid requiring a replacement check plus interest for late payment.

MISCELLANEOUS MATTERS

The amended complaint and trial testimony raised questions regarding repairs to the corporate building in Syosset by Steven Goerler; a personal loan of \$750 to Matthew Goerler and an accrual of tax payments on behalf of the Tennessee property.

The return of the \$750 loan to Matthew Goerler^a is supported by ledger entries of \$400 and \$350. The payments to Steven Goerler for repairs to the roof (approximately \$3000) and to a bathroom were testified to by RBG. However, there was no written evidence submitted to support this testimony. Moreover, no lease was produced which would determine the

responsibility of the landlord or tenant to repair the roof or bathroom.

The tenants of the corporation in the Tennessee property, due to financial problems, became delinquent in payments for real estate taxes and rents. RBG contends that 4-65 had to consider paying said taxes to protect the property and thus carried the payments on an accrual basis but never actually made payment.

ADDITIONAL CLAIMS

The plaintiff argues that the annual consulting fee of \$25,000 to be paid by 4-65 to RBG was improper. The defendant's response as to his various responsibilities and duties covering the Syosset, Tennessee and Jamesport properties, and his operation of 4-65 entitled him to compensation. The books and records also show that for many years prior he received no consultants fee and over this accounting period actually received \$17,500.00. The plaintiff's accountant contended that the failure to take the fee was a benefit to RBG and a tax overpayment to 4-65. According to Mr. Weissman "The whole transaction is inappropriately handled by the accountant."

CONCLUSIONS

In a shareholder derivative suit, a shareholder challenging corporate transactions must demonstrate that when reviewed as a whole the corporate transactions complained of were tainted by fraud, illegally or self-dealing and were not justified by legitimate business purpose.

Belloff v. Wayvo Avenue Inc., 280 AD2d 503.

The court finds that the defendant has established that he was neither paid nor received excessive compensation. No fraud or bad faith was demonstrated. The compensation of \$25,000.00 per year was Board approved and not excessive. Likewise, the decision not to take

the compensation by Robert B. Goerler does not amount to waste or fraud.

(Lewis v. Akers, 227 AD2d 595).

Likewise, the allegations regarding a personal loan to Matthew Goerler of \$750.00 and to Steven Goerler of \$3,532.90 are sufficiently explained and justified by defendant and do not rise to allegations of waste or mismanagement.

The plaintiff alleges legal fees of \$28,000 were paid by 4-65 for the personal defense of Robert B. Goerler. However, defendant indicates those corporate funds were used to defend and oppose litigation brought against the corporation. Therefore, the court finds no waste with respect to this issue.

With respect to the loans from 4-65 to Crest Good defendant argues these loans predate 1995 (by 25 some odd years) and have always paid interest at 9 ½ %. It is noted however, that very little of principal has been paid over the course of the years. Defendant concedes the existence of a loan since 1995 of \$189,000 from 4-65 to Crest Good.

Likewise the loan to Savoy had a balance of \$44,000 in 1995 and \$48,000 in February of 2002. Defendant argues that \$27,281.71 in interest was paid during that period.

Plaintiff argues that the continued loans amount to self-dealing since plaintiff's trust only owns 21% of Crest Good at best. Plaintiff argues that 4-65 assets are being diverted/invested in companies Savoy and Crest Good in which defendant Robert B. Goerler has the predominant interest. As a director and officer of 4-65 Robert B. Goerler owed 4-65 an obligation to provide good and prudent management for the welfare and advantage and best interest of 4-65, and its shareholders (**Albert v. 28 Williams St. Corp.** 63 NY2d 5727).

To continue to make loans to corporations owned and controlled predominately by

defendant and which sporadically pay interest, but not collect the principal may amount to self dealing. It is well settled that in a stockholder's derivative action it must be shown among other things that the corporation has a cause of action, and that the directors have unreasonably refused to prosecute such cause of action (Markewich v. Newberg, 27 Misc2d 1040).

Closely held family corporations are not required to be directed with the same degree of care and responsibility as larger corporations whose stock is more widely distributed (Newfield v. Ettlinger, 22 Misc2d 769; 10 AD2d 947).

The issue here of whether the continued loans to companies who have not repaid loans or interest on said loans in a timely fashion is in the best interest of 4-65. Pinnacle Consultants Shareholders of Leucadic Nat'l Corp v. Leucadia Nat'l Corp, 923 F Supp 439).

However, in this case of the highly incestuous relationship between Crest Good and 4-65, in which 4-65 has a 49% interest in Crest Good, then 4-65 would lose a valuable asset if the collection of these loans were enforced in a more vigorous fashion. Therefore, to preserve an asset of 4-65 namely Crest Good or Savoy, these loans have traditionally been extended.

Plaintiffs have not demonstrated any damage to 4-65. Interest at 9 to 9 1/2 % is being paid, albeit sometimes late.

Therefore, under the circumstances of this case, the court does find that Robert B. Goerler actions were in the best interest of 4-65. The court finds no improper self-dealing, no fraud nor waste.

The Jamesport property was acquired in 1988 predating this accounting. The accounting demonstrate that 1/2 rent is paid to 4-65 and is current. There was no testimony regarding

irregularities with respect to who tenants were or payment of rent. The tax issue with respect to the property was adequately explained by defendant and does not form a basis for a cause of action at the instant case.

Business Corporation Law Sec. 626(e) permits an award of attorneys fees for the attorney for a successful derivative plaintiff out of corporation's recovering from the defendants Lewis v. SL & E Inc., 629 F 2d 764; Seinfeld v. Robinson, 246 AD2d 291).

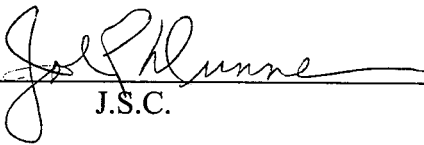
However, the cases cited in Seinfeld have denied plaintiff's counsels request for an award of counsel fees and reimbursement of expense where the action had not produced tangible benefit for corporation or its shareholders and such an award would have a detrimental effect of penalizing corporation.

The plaintiff's request for counsel fees therefore, is denied.

In light of the foregoing, the court finds for the defendants.

It is so ordered.

Dated: August 14, 2002



J.S.C.

ENTERED

SEP 03 2002

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COUNTY CLERK'S OFFICE**