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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

In the Matter of the Application of
JOHN MARCIANO,

Petitioner-Plaintiff,

§ 1104-a, Dissolving CHAMPION MOTOR GROUP, INC.,
d/b/a Bentley of Long Island,

Respondent,

INDEX NO.: 001264/2006
MOTION DATE: 01/12/2007
MOTION SEQUENCE: 004, 005 and 006

- and -

GARY BRUSTEIN, MICHAEL TODD, 115 SOUTH SERVICE ROAD LLC, BENTLEY LONG ISLAND LLC, GOLD COAST LUXURY AUTO LLC, BTM GROUP LLC, CHAMPION MOTOR SERVICE, INC., CHAMPION AUTO BROKERS, INC. and CHAMPION LEASING GROUP, INC.,

Additional Respondents-Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed..... 1
Notice of Motion, Affirmation & Exhibits Annexed..... 2
Notice of Cross Motion, Affirmation, Affidavits & Exhibits Annexed..... 3
Reply Affirmation in Support of Respondents-Defendants' Motion to Dismiss and in Opposition to Petitioner-Plaintiff's Motion for Leave to Amend and Supplement his Petition-Complaint and for Injunctive Relief of Jeffrey G. Stark..... 4
Confidential Reply Affirmation of Edward M. Ross & Exhibits Annexed..... 5
Reply Affirmation in Further Support of Plaintiff's Cross Motion for Leave to Amend and to Compel Defendants to Restore the Status Quo Ante of Edward M. Ross & Exhibits Annexed..... 6

Supplemental Affirmation in Further Support of Plaintiff's Cross Motion for Leave to Amend of Edward M. Ross, Supplemental Affidavit of David S. Marcus, CPA & Exhibits Annexed..... 7
Affirmation of Jeffrey G. Stark, Affidavit of Kenneth Abrahams, Affidavit of Gary Brustein & Exhibit Annexed..... 8
Reply Affidavit of Kenneth Abrahams, Affidavits & Exhibits Annexed..... 9

Motion by the petitioner John Marciano for an order, *inter alia,* pursuant to BCL § 624, and LLCL § 1102 (1) permitting him to inspect certain book and records; and (2) directing the defendants to disclose and produce certain documents and information for the period subsequent to the date of the subject petition in accord with the plaintiff's proposed discovery order dated September, 2006 (Motion Sequence #004).

Cross motion pursuant to CPLR 3212 by the defendants for summary judgment dismissing the fourth and fifth causes of action alleging breach of fiduciary duty and entitlement to an accounting (Motion Sequence #005).

Further cross motion by the petitioner John Marciano for an order (1) granting leave to amend the petition and complaint; and (2) for a preliminary inunction pursuant to BCL 1113 and 1115 directing the defendants to resume making payments and distributions to him "in the same amount and proportion as they were making prior to the initiation of this litigation and until recently ..." (Motion Sequence #006).

As fully detailed in this Court's September 5, 2006 order, this is a contentiously litigated, "hybrid" action and proceeding commenced by the plaintiff John Marciano for, initially dissolution of the respondent Champion Motor Group, Inc., d/b/a Bentley of Long Island ["Champion"].

In brief, Marciano alleges that the individual defendants Gary Brustein and Michael Todd, both principals in Champion, have engaged in oppressive conduct toward him within the meaning of Business Corporation Law § 1104-a[a][1], thereby entitling him to an order of dissolution (*see also*, Limited Liability Company Law § 702). He also alleges oppressive conduct against the corporation, Champion.

The plaintiff's combined petition and complaint further demands, *inter alia*, an

accounting, as an individually asserted claim and derivatively on behalf of Champion and the LLCs, and also alleges that the individual defendants breached their fiduciary duty to him (Cmplt., ¶¶ 66-71).

Significantly, it was disclosed during prior motion practice and is now established, that the plaintiff formally holds only one share of Champion Leasing Corporation, (Leasing) an entity operated by Brustein and Todd before they were awarded a Bentley franchise. Plaintiff's stock, constituting an undisputed .99% of Leasing's outstanding shares does not make him a shareholder of Champion although Leasing owns Champion. Plaintiff asserts, nonetheless, that he holds what he has repeatedly described as 38% "beneficial" interest in Champion – although, as this Court noted in its September 5, 2006 order, "Champion's governing, corporate documents do not identify ... [the plaintiff] as a shareholder, director, officer – or a principal of any sort ..."

The defendants have opposed the petition by arguing, *inter alia*, that the plaintiff lacks standing to maintain a dissolution action under BCL § 1104-a since – insofar as the corporations's record indicate – he does not own the requisite, twenty percent shareholder interest in Champion and, in fact, deliberately, attempted to hide his alleged interest in Champion and to a lesser degree in Leasing.

In recently concluded motion practice, the Court denied the defendants' 3211 motion to dismiss the action and granted limited portions of two separately, noticed orders to show cause by the plaintiff, in which he sought, *inter alia*: (1) dissolution of the involved corporate entities and/or LLCs; and (2) a broad array of pre-judgment remedies, including "full and unfettered access" to all of the corporation's books and records pursuant to BCL § 624.

In disposing of the prior applications, this Court held, among other things, that: (1) "unresolved factual issues exist[ed] with respect to precisely what sort of ownership and/or shareholder rights – if any – the parties actually intended the plaintiff to possess upon his involvement in Champion;" (2) the plaintiff had at least facially stated a claim for dissolution based on the defendants' conduct in excluding him from the business; and (3) that the claimed "reasonableness of the defendants' exclusionary conduct" required "further factual development through discovery in the underlying action."

It is at this juncture that it would be well to note that plaintiff's legal relationship to the corporations, Leasing and Champion, has not been definitely labeled - by him. At times he is a shareholder, employee, director/officer and investor. At the time that the individual parties secured the failing Bentley dealership from Rallye Motors the record reflects that plaintiff brought capital and resources to the deal and in a letter agreement from Bentley he is listed as a 30% owner and the Secretary/Treasurer. Yet there are no corporate formalities reflecting this circumstance. There is no question that his name was associated with Champion as when he was indicted for securities fraud, and the charge became public, Brustein and Todd made hast to disassociate themselves, and the business, from him in every possible respect. At the last appearance before the court on June 6, 2007 he was neither an officer, nor employee nor any longer a guarantor of any line of credit or debt of Champion.

With respect to the issue of access to books and records, this Court previously took note of the well settled principle that "a shareholder has both a statutory and common law right to examine corporate documents, including, among other things, certain shareholder records, corporate books of account, annual balance sheets, and profit and loss statements".

However, the Court ultimately found that upon the "thicket of inconclusive and conflicting allegations" advanced by the parties, it could not definitively resolve "the extent to which – if at all – the plaintiff is entitled to further access to additional corporate documents and materials."

As a result, the Court set the matter down for a conference to consider the extent to which further document access was permissible and appropriate under the common law and/or BCL § 624.

The parties later appeared before the undersigned for a hearing relative to, *inter alia*, the issue of discovery (Pltff's Mot. to Compel. Exh., "A"[Tr. dated October 5, 2006]).

Prior to the hearing, the plaintiff submitted a proposed discovery order which contained various subdivisions and categories of documents pertaining to Champion Leasing Group, Champion Motor Group and 115 South Service Road, LLP.

Significantly, the proposed order requested post-filing disclosure and/or inspection, *i.e.*,

disclosure pertaining to events occurring subsequent to the January, 2006 filing date of the instant matter.

After hearing argument, this Court denied the plaintiff's demands for post-filing disclosure – although the Court later permitted the plaintiff to make a formal motion relating to the issue (Tr., at 15-16, 31, 36). But the Court also denied a request by the defendants for bifurcated discovery (Tr. at 31-32).

The parties and the Court then reviewed the proposed discovery order submitted by the plaintiffs and discussed the extent to which agreement had been reached with respect to certain of the requests made (Tr., at 3-5). Specifically, Court took note of the fact that the defendants had consented to items A[1], B[1] and C [1], [3], [4], [5] and [7] – although only for the time period which preceded the filing of the matter in January of 2006 (Tr., 4).

To buttress his claims, and throughout the papers he has submitted, Marciano has not only relied on his status as a "beneficial" owner, but also his alleged, current and continuing financial stake in Champion, as evidenced by the oft-cited "$1 million letter of credit"; his claimed million dollar investment in "loans and capital contributions"; and his current status as a "personal guarantor" of Champion's new and used vehicle and floor plan financing, which he claims exceeds the sum of $15 million (Ross [Oct 30] Aff., ¶¶ 16-17; Marciano Supp Aff., ¶¶ 3-5; Marcus [Dec 14] Aff., ¶¶ 6-8).

The defendants advise, however, that they have recently secured Marciano's release from all of the above-mentioned areas of potential liability, including the Floor plan financing "represented by * * * [an] attached Credit and Security Agreement and [the] Stand-By Letter of Credit which was additional collateral under the Credit and Security Agreement".

Additionally, the defendants claim that three additional guarantees (relating to Champion Motor Group, Inc., Champion Leasing, Group, Inc., and Champion Auto Brokers, Inc) were similarly released, as was Marciano's personal guarantee in connection with the lease for the dealership premises, located at 1115 South Service Road, Westbury, NY (Stark Cross Motion [Nov 21] Aff., ¶ 6, fn 3, at 4).

In any event, an order on consent was entered into on June 6, 2007 which disposes of

plaintiff's motion to compel. An order of confidentiality has been stipulated to and until plaintiff's amended pleading is served and the causes of action which remain viable are recognized the aforesaid order of June 6th will guide discovery.

Turning to plaintiff's cross-motion, he has previously, in 2005, received certain shareholder distributions (Cmplt., ¶ 46[b]) and also had been receiving regular, monthly payments of $6,250.00, which the plaintiff himself contends are comprised in roughly equal parts of "interest due to Marciano by reason of the $1 million letter of credit," and "payment to Marciano for services rendered" (A. Cmplt; Cmplt., ¶ 46[c]). The plaintiff's cross motion seeks relief pursuant to BCL§§ 1115, 1118 restoring the *status quo* by requiring the defendants to continue making the above-mentioned payments.

The defendants had agreed to continue making these monthly payments post-litigation and opposed the plaintiff's prior application by asserting that the plaintiff was not being oppressed, in part, because he was receiving them (Brustein [March 22] Aff., ¶ 47 *accord*, Stark [May16] Aff., ¶ 23).

However, by letter dated November 14, 2006, the defendants have advised that "no further distributions will be made from this date forward" (Pltff's Cross Mot., Exh., "E"). According to the defendants, the payments were based on these now cancelled obligations and thus are no longer necessary or required or proper corporate expenditures. The defendants' November 14th letter further provides that since the plaintiff has "never been an employee, officer, or director nor does he provide any continuing service to the company, "there is no reason to provide him with compensation or distribution until and when a dividend is declared and his ownership in the company has been determined" by the Court.

That branch of the motion which is for injunctive relief pursuant to BCL §§ 1115, 1118, compelling the defendants to make payments and distributions *pendente lite,* in "the same amount and proportion" which they were making prior to and during the pendency of the litigation, is denied.

To the extent that the plaintiff is referring to the monthly payments which the defendants have been voluntarily making, but have recently suspended, the plaintiff's own pleading

describes these amounts as attributable exclusively to "interest due" "by reason of the [now] terminated $1 million letter of credit," as well "payment[s] to Marciano for services rendered" (Cmplt., ¶¶ 47[c]; A. Cmplt.,¶ 47[c]).

It is undisputed that the plaintiff's various obligations under, *inter alia*, the letter of credit have been terminated and that he is no longer providing personal services to the subject corporate entities. Moreover, and while the defendants affirmatively terminated the plaintiff's involvement in Champion, it is unclear precisely what sort of employment arrangement, if any, the plaintiff, allegedly had with the defendants and, in any event, this Court has already held that any conclusion "relative to the claimed propriety and reasonableness of the defendants' exclusionary conduct must await further factual development through discovery in the underlying action."

Under these factual circumstances, the plaintiff has not established his entitlement to injunctive relief compelling the defendants to continue making the monthly payments which they have since terminated.

Lastly, while the plaintiff implies that additional payments or "distributions"– separate apart and separate from the recently cancelled monthly payments – have also been terminated, the plaintiff's submissions do not identify the specific type of payment to which they are referring. Absent particularized discussion describing, among other things, the precise legal and factual basis underlying the plaintiff's claims, the Court will not speculate as to the plaintiff's entitlement to additional *pendente lite* payments (*e.g*, Ross [Dec 15] Aff., ¶ 42; Ross [Jan 11] Reply, ¶ 30).

The defendants cross move for an order dismissing the fourth and fifth causes of action, which allege, respectively entitlement to an accounting and breach of fiduciary duty. Those claims are styled as "either" individual or derivative claims (but apparently not as both)(Cmplt., ¶¶ 66-71; Oct. 5 Tr. at 7).

Lastly, the plaintiff has cross moved by additional order to show cause for leave to amend the complaint by adding (1) separately captioned individual and derivative fiduciary/accounting causes of action; (2) a new eighth cause of action alleging that the defendants breached the parties' underlying agreement with respect to his status and participation in the businesses; and

(3) a new tenth cause of action which alleges that the plaintiff made a $100,000.00 personal loan to codefendant Brustein which has, to date, not been fully repaid.

The proposed pleading also contains a newly added section entitled "supplemental wrongful acts ...occurring or discovered after initiation of this action", which alleges that the defendants have, *inter alia*, denied the plaintiff access to relevant books; paid themselves "lavish and excessive" compensation; incurred excessive and improper expenses masquerading as Travel and Entertainment" charges; and generally looted and wasted corporate assets (Proposed A. Cmplt., ¶¶ 56-61).

Previously, the alleged wrongdoing set forth in the plaintiff's original complaint focused primarily – if not exclusively – upon the defendants' conduct in expelling the plaintiff from the business and did not contain particularized allegations of post-commencement waste or mismanagement.

The plaintiff's motion for leave to serve an amended complaint in the form annexed to their motion papers is granted. The defendant's motion to dismiss the fourth and fifth causes of action is denied without prejudice.

With respect to the motion to amend, it is settled that "[p]ermission to amend pleadings should be 'freely given'" (*Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983][citations omitted] CPLR 3025[b]; *McCaskey, Davies & Assoc. v. New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]; *In re Salon Ignazia, Inc.*, 34 AD3d 821).

The decision to permit or deny an amendment is entrusted to the sound discretion of the Supreme Court (*see, Edenwald Contr. Co. v. City of New York, supra; Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]).

Here, since the proposed amended pleading is "neither palpably insufficient nor patently devoid of merit, and would not prejudice or surprise the opposing party," the application to amend should be granted (*Roberts v. Borg*, 35 AD3d 617, 618; *In re Salon Ignazia, Inc., supra*; *Emilio v. Robison Oil Corp.*, 28 AD3d 417).

It is settled that directors and officers of a corporation owe a fiduciary duty to shareholders – the breach of which may give rise to a direct cause of action in favor of the

aggrieved, individual shareholder (*see generally, Alpert v. 28 Williams Street Corp.*, 63 NY2d 557, 568-569 [1984]; *PDK Labs, Inc. v. Krape,* 277 AD2d 212, 213 *see also, Global Minerals and Metals Corp. v. Holme*, 35 AD3d 93; *Barbour v. Knecht*, 296 AD2d 218, 227; *Belloff v. Wayco Agencies, Inc.*, 280 AD2d 503, 504; *Tornick v. Dinex Furniture Indus.*, 148 AD2d 602; *In re Cocolicchio*, 6 Misc.3d 1041(A) 2005 WL 689493 [Supreme Court, New York County 2005] *cf., Albany Plattsburgh United Corp. v. Bell*, 307 AD2d 416, 419; 12B, *Fletcher Cyclopedia Law of Private Corporations,* § 5911).

While "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only" (*Abrams v. Donati*, 66 NY2d 951, 953 [1985]), where the plaintiff's "objective is to vindicate his personal rights," an individual claim will lie (*DeMarco v. Clove Estates, Inc.*, 250 AD2d 724 *see generally, Javaheri v. Old Cedar Development Corp.*, 22 AD3d 804, 805 *see, Collins v. Telcoa Intern. Corp.*, 283 AD2d 128, 133; *PDK Labs, Inc. v. Krape, supra*, at 213; *Lazar v. Robinson Knife Mfg. Co., Inc.*, 262 AD2d 968, 970; *Hammer v. Werner*, 239 App Div. 38, 44 *cf., Glenn v. Hoteltron Systems, Inc.*, 74 NY2d 386, 392 [1989]; 15 NY Jur2d Business Relationships, §§ 1154-1155).

Here, the Court agrees that "[t]he allegations of plaintiff's wrongful exclusion from...[Champion's] corporate affairs, if proven, are, actionable as individual claims," as is the plaintiff's related, equity-based cause of action for an accounting (*In re Cocolicchio*, 6 Misc.3d 1041(A), 2005 WL 689493, *Slip Opn* at 6 [Supreme Court, New York County 2005] *see, Javaheri v. Old Cedar Development Corp., supra*, at 805; *Tornick v. Dinex Furniture Indus., supra see generally, Andrew Greenberg, Inc. v. Svane, Inc.*, ___AD3d___ 2007 WL 108503 [3rd Dept. 2007]; Haig, *4A N.Y. Prac. Com. Litigation in New York State Courts*, § 74:3 [2nd ed. 2006] ['the same set of facts can give rise to both direct and derivative claims'"] *cf., Abrams v. Donati, supra*; *Barbour v. Knecht, supra,* at 227-228; *Lazar v. Robinson Knife Mfg. Co., Inc., supra*)..

Further, the newly proposed claims predicated upon waste, looting and excessive compensation are sustainable as derivative causes of action, since they assert alleged wrongs perpetrated by the defendants against the subject, corporate entities (*Abrams v. Donati, supra;*

Winter v. Bernstein, 177 AD2d 452, 453). The foregoing is of course contingent on his being a shareholder at the time of the alleged wrong

Finally, the Court disagrees that the new claims interposed are dismissible as a matter of law at this juncture, on the various grounds asserted by the defendants, *i.e.*, that these claims are fatally conclusory (*cf., Marx v. Akers*, 88 NY2d 189, 204-205 [1996]); that the plaintiff has purportedly and fully acquiesced in all the misconduct alleged (*Diamond v Diamond*, 307 NY 263, 266 [1954]; *Winter v. Bernstein, supra,* at 453; *Rodgers v. Bell*, 202 AD2d 1040); and/or that the plaintiff has failed to adequately allege the futility of making a pre-action demand upon the Board pursuant to BCL § 626[c] (*Bansbach v. Zinn,* 1 NY3d 1, 11-12 [2003]; *Javaheri v. Old Cedar Development Corp., supra,* at 805; *Marx v. Akers, supra*).

Nor are the plaintiff's newly framed eighth and tenth causes of action – which both allege breach of contract – "palpably insufficient nor patently devoid of merit" (*see e.g., Roberts v. Borg, supra*). Indeed, where denial of plaintiff's claim for dissolution is all but a foregone conclusion, his status as a party to mutual agreements may put him on firmer ground to gain the relief he seeks.

The proposed amended complaint in the form annexed to the plaintiff's motion papers shall be deemed served, and the defendants' time to serve an amended answer shall be enlarged until 20 days after service upon them of a copy of this decision and order (*see generally, Giarguaro S.P.A. v. Amko Intern. Trading, Inc.*, 300 AD2d 349, 350; *Santiago v. County of Suffolk*, 280 AD2d 594).

The Court has considered the parties' remaining contention and concludes that none warrants relief beyond that granted above.

The foregoing constitutes the decision and order of the Court.

Dated: June 15, 2007