SHORT FORM ORDER

INDEX NUMBER: 10413-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 04-17-2012
Motion Submit Date: 11-13-2012
Motion Sequence No.: 006 MD

[ ] FINAL
[X] NON FINAL

X

Brian Abrams, individually and as a shareholder of the ALLWAYS ELECTRIC CORPORATION on behalf of himself and all other shareholders of ALLWAYS ELECTRIC CORPORATION similarly situated, and in the rights of ALLWAYS ELECTRIC CORPORATION,

Plaintiffs,

-against-

ALLWAYS ELECTRIC CORP., SHEEHAN & COMPANY, RICHARD ESPOSITO, individually, and ROBERT C. ALMRECHT, individually,

Defendants.

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ORDERED that the defendants' motion for summary judgment (motion sequence number 006) is denied.

Factual and Procedural Background

The plaintiff, Brain Abrams ("Abrams"), commenced this action in 2009 ("2009 Action") against the defendants, Allways Electric Corp. ("Allways") and Richard Esposito ("Esposito"). In the Second Amended Verified Complaint, Abrams alleges, among other things, that he was employed as an electrician from 1987 through August 2003 by Allways, a company in the business of providing electrical repair and installation services. Abrams further alleges that on or about August 7, 1998, Esposito, the majority shareholder and director of Allways, agreed to transfer 5% of Allways stock to Abrams, in return for which Abrams was to receive a straight salary and work overtime without compensation, and without sharing in

profits until such time as he contributed "sweat equity" equivalent to the value of 5% of the stock in Allways.

The Second Amended Complaint alleges, upon information and belief, that shares of stock in Allways were issued to Abrams in September 1998. It is further alleged that sometime after 2000, Esposito informed Abrams that he had fulfilled his "sweat equity"contribution for 5% of Allways stock. Nevertheless, Abrams claims that Esposito continued to withhold any distribution of the profits to which Abrams was entitled as a shareholder and refused to give Abrams an accounting of his capital account. Abrams employment with Allways terminated in 2003. In 2009, in response to Abrams' written demand to be paid the value of his shares, Esposito stated that Abrams did not own any stock.

The Second Amended Complaint contains causes of action against Allways and Esposito for breach of the shareholders' agreement, specific performance of the shareholders' agreement, breach of fiduciary duty, conversion, and fraud. Defendants served a Verified Second Answer to the Amended Verified Complaint. Defendants now move for summary judgment.

Plaintiff opposes the motion.

Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]). Issues of credibility cannot be determined on a motion for summary judgment (*Cerniglia v. Loza Rest. Corp.*, 98 AD3d 933, 935 [2d Dept. 2012]).

The central issue in this action is whether Abrams ever became a shareholder in Allways and, if so, at what point in time. In their motion papers, the defendants do not address the individual causes of action asserted by Abrams. Rather, Defendants argue that they are entitled to summary judgment because the

evidence demonstrates, as a matter of law, that Abrams never became a shareholder of Allways. In opposition, Abrams contends that summary judgment should be denied because the conflicting evidence demonstrates the existence of numerous issues of fact as to whether Abrams ever became a shareholder of Allways.

As recently set forth by the Appellate Division, Second Department:

> "'The mere fact that the corporation did not issue any stock certificates [to an individual] does not preclude a finding that [the individual] has the rights of a shareholder' (*French v French*, 288 AD2d 256, 256 [2001]; *see Matter of Bebincasa v Garrubbo*, 141 AD2d 636, 638 [1988]). 'In the absence of a share certificate . . . a court must determine from other available evidence whether a putative shareholder in fact enjoys that status' (*Matter of Pappas v Corfian Enters. Ltd.*, 22 Misc 3d 1113[A], 2009 NY Slip Op 50109, [2009]). In that regard, 'the relationship between a corporation and its stockholders is contractual . . . to constitute one a stockholder a subscription or contract whereby the right to hold stock upon some condition to demand stock and to exercise the rights of a stockholder is required' (*id.* [internal quotation marks omitted]). Pursuant to Business Corporation Law § 504 (a), consideration for the issuance of shares can include money or other property, or 'labor or services actually received by or performed for the corporation or for its benefit or in its formation or reorganization.'

Kun v Fulop, 71 AD3d 832, 833-834 [2d Dept 2010]).

Here, the Defendants have not met their burden of demonstrating entitlement to judgment as a matter of law as the evidence submitted in support of their motion does not conclusively establish that Abrams never became a shareholder of Allways. For example, the Agreement of Shareholders of Allways Electric Corp. dated August 7, 1998, a copy of which is submitted by Defendants in support of their motion, specifically names Abrams as a shareholder and is signed by Abrams, although it does not list the number of shares owned by him. Additionally, the Defendants admit that Allways issued schedule K-1s (tax documents) to Abrams from 1998 until 2003, reflecting that he was a 5% shareholder in Allways. On their face, these documents appear to be consistent with Abrams' claim that he became a shareholder in 1998. Moreover, Although the Defendants submit various affidavits in an attempt to explain why Abrams was a signatory to the Agreement of Shareholders and why he was issued K-1s, it is not the court's function on

a motion for summary judgment to assess credibility (*A Dan Jiang v. Ji-Liang Liu*, 97 AD3d 707, 709 [2d Dept. 2012]). Accordingly, the Defendants' motion for summary judgment is denied (*see Matter of Corfian Enter., Ltd.*, 52 AD3d 828 [2d Dept 2008]).

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: January 15, 2013
Riverhead, New York

EMILY PINES
J. S. C.

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