

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

COPY

PRESENT: Honorable Elizabeth H. Emerson

x
RICHARD CARVELLA, JR., on behalf of himself
as a Shareholder of ROCK SOLID CORP., and in
the Right of ROCK SOLID CORP., and on behalf
of all other Shareholders of said corporation
similarly situated,

Plaintiff,

-against-

ALESSANDRO A. GIULIANO, a/k/a AL
GIULIANO and ROCK SOLID CORP.,

Defendants.

RAYMOND A. GIUSTO, P.C.
Attorneys for Plaintiff
715 South Country Road
West Bay Shore, New York 11706

VINCENT J. TRIMARCO, ESQ.
Attorney for Rock Solid Corp.
1038 West Jericho Turnpike
Smithtown, New York 11787

ALESSANDRO A. GIULIANO a/k/a AL
GIULIANO
Pro Se Defendant
45 Araca Road
Babylon, New York 11702

DECISION AFTER TRIAL

On March 14, 2013, the parties in the above-captioned matter appeared for a trial on damages. Before affording the plaintiff the opportunity to present its proof, the court summarized the procedural history of this case. Of note is the fact that this 2006 case was originally certified ready for trial in June 2008. In October 2009, a trial on the issue of liability was conducted before a jury. The jury found that defendant Alessandro Giuliano had interfered with the plaintiff's right to possession of shares of Rock Solid Corp. and that he had breached his fiduciary duty to the plaintiff. On December 8, 2009, the court conducted a conference with counsel and directed them to prepare for a trial on the question of damages. Thereafter, defendant Giuliano commenced a bankruptcy proceeding, and the case was stayed. Once the stay was lifted, the parties completed their discovery on the question of damages. A bench trial on damages was scheduled for March 13, 2013.

On that day, counsel for the plaintiff and counsel for defendant Rock Solid Corp.

appeared. Defendant Giuliano appeared pro se. The plaintiff's counsel was invited to present witnesses and other admissible evidence in support of plaintiff's damage claim. The plaintiff's counsel informed the court that it had no witnesses and no other evidence that it was prepared to present. Instead, the plaintiff's counsel requested that the court declare the plaintiff to be the owner of 25% of the issued and outstanding shares of Rock Solid Corp. and award the plaintiff attorney's fees and punitive damages. The court questioned the plaintiff's counsel regarding this request, reminding counsel of the causes of action in the complaint, the finding by the jury, and the fact that the stock of Rock Solid Corp. is presently owned by Mr. Trimarco and his son, who are not parties in this case. In addition, the court inquired as to the basis of plaintiff's claim for attorney's fees. In response to the court's questions, plaintiff's counsel offered an affidavit detailing counsel's time and disbursements charged to this matter and two cases, one from 1867 and one from 1894, that counsel argued supported the request for attorneys fees. Defendant Giuliano also addressed the court and answered the court's questions. Finally, counsel for Rock Solid Corp. pointed out that 100% of the shares of Rock Solid Corp. are presently owned by the Trimarcos and that such shares have a negative net worth because the corporation is deeply in debt. Finally, counsel for Rock Solid Corp. stated that he had no objection to turning over 25% of the shares of the corporation to the plaintiff, as long as the plaintiff assumed his proportionate share of the outstanding debt.

Turning first to the question of damages, as previously noted, plaintiff presented no admissible evidence and offered no legal argument as to how the court could grant such relief. Notwithstanding the jury's verdict that Mr. Guilano had converted the plaintiff's shares and breached his fiduciary duty to the plaintiff, plaintiff's counsel ignored the fact that the shares are presently owned by the Trimarcos, who have not been named as parties in this case. Presumably, the plaintiff is entitled to an award of damages against defendant Guiliano, but the plaintiff made no attempt to quantify such damages or to support a claim for damages. As is always the case, the burden of proof rests with the plaintiff. That means that plaintiff must put forth proof in admissible form that demonstrates his entitlement to damages. In this case, although plaintiff's counsel requested various forms of relief, no proof was offered to support those requests and/or to meet the plaintiff's burden. Accordingly the court declines to award any damages.

The complaint does not contain a request for declaratory relief. The court may grant any type of relief within its jurisdiction appropriate to the proof, whether or not demanded (see, CPLR 3017 [a]), as long as no party can claim prejudice (see, CPLR 3026). The plaintiff's request for declaratory relief was made for the first time at the trial on the issue of damages. The court finds that, given the late stage of the proceeding at which the request was made, it would be highly prejudicial to the defendants to award the plaintiff declaratory relief. The only questions presented to the jury were whether the defendant Giuliano intentionally exercised control over the plaintiff's shares in Rock Solid Corp. without the plaintiff's knowledge, consent, or authority and whether he breached his fiduciary duty to the plaintiff. The question of what percentage of the shares of Rock Solid Corp. was owned by the plaintiff was not presented to the jury. Moreover, as previously noted, 100% of the shares of Rock Solid Corp. are presently owned by the Trimarcos, who represented that they paid fair value therefor. The Trimarcos are not parties to this litigation, and the court does not have jurisdiction over them. Accordingly, the court declines to award the plaintiff the declaratory relief requested.

The rule in New York remains that “attorneys’ fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule” (**Glenn v Hoteltron Sys.**, 74 NY2d 386, 393). Plaintiff’s counsel acknowledged that these circumstances are not present here, but instead relied upon **McDonald v North** (47 Barb 530 [1867]) and **Hynes v Patterson** (95 NY 1 [1884]), neither of which support the plaintiff’s requests for attorney’s fees and punitive damages. Further, plaintiff’s counsel was not able to articulate a legal theory that would allow the court could grant such relief. Accordingly, the court declines to award either attorney’s fees or punitive damages.

Dated: April 2, 2013

HON. ELIZABETH HAZLITT EMERSON

J.S.C.