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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Justice

Index Number : 603610/2008
SCHIANO, NANCY
vs.
MARINA INC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: APR 30 2012

_____, J.S.C.
JUDITH J. GISCHE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Nancy Schiano,

Plaintiff (s),

-against-

Marina, Inc., Jump Apparel Co., Inc. a/k/a Jump Apparel, Inc., Glenn Schlossberg and Helen S. Brown, as executrix of Mark Brown,

Defendant (s).

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DECISION/ ORDER
Index No.: 603610-08
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (CPLR 3212) w/GS affid, KML affirm (sep backs), exhs	1,2,3
Pltf's opp w/ RAD affirm, NS affid (sep backs), exhs	4,5
Defs' reply w/PC affid	6
Plt's sur-reply w/RAD affirm, PC affid, exhs	7
Stips of adjournment	8

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Issue has been joined by defendants Marina, Inc. ("Marina"), Jump Apparel Co., Inc. a/k/a Jump Apparel, Inc. ("Jump"), Glenn Schlossberg ("Schlossberg") and Helen S. Brown, as executrix of the Estate of Mark Brown ("Brown") (collectively "defendants"), who now move for summary judgment dismissing plaintiff Nancy Schiano's ("Schiano") complaint against them. Having brought a timely motion for summary judgment, within 120 days of the filing of the note of issue on June 24, 2011,

summary judgment relief is available and, therefore, this motion will be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Facts and Arguments

This case involves a dispute among the parties about whether Marina is simply a "brand" or division of Jump or a completely independent corporation. The parties also disagree whether certain agreements were ever "effectuated." Whereas Schiano contends they were effectuated and subsequently breached, defendants contend that Schiano not only never worked for Marina, the company was unprofitable and, therefore, the agreements were effectively abandoned. Defendants also claim that Schiano was simply an at-will-employee of defendant Jump and that Schlossberg had the right to fire her from employment in August 2008 when she refused to accept a paycut. The complaint asserts three causes of action:

> **1st cause of action** - Breach of Employment Agreement (against Marina, Schlossberg, Jump)
>
> **2nd cause of action** - Breach of Shareholders' Agreement (against Schlossberg[1] and Brown)
>
> **3rd cause of action** - Breach of Fiduciary Duties (against Schlossberg)

Unless otherwise stated, the following facts are established or unrefuted:

In late 2000, Schiano met with Schlossberg and Mark Brown (now deceased) to explore the possibility of a joint venture involving the design, production, marketing and distribution of special occasion wear. At that time, Schiano was working at Scala as Vice President of sales, Schlossberg was the President of S.F. Enterprises Corporation

[1]This claim was previously dismissed against Schlossberg.

("SF Enterprises") and Brown was the President of Onyx Nite, Inc., a member of the "Jump Group." Shortly thereafter, in November 2000, Marina was incorporated.

There is an employment agreement ("employment agreement") dated December 4, 2000 signed by Schiano, on her own behalf and by Marina. Schiano also signed the employment agreement on behalf of Marina in her capacity as Marina's President. Jump guaranteed the payment of Schiano's compensation and Schlossberg signed the guarantee on Jump's behalf in his capacity as President.

Another document, also dated December 4, 2000, is Marina's shareholders' agreement ("shareholders' agreement"). The shareholders' agreement is among Marina, Shiano, Brown and non-party SF Enterprises. Shiano signed the agreement individually and as President of Marina. Brown signed as Vice President of Marina and Schlossberg signed as President of SF Enterprises.

A third agreement, identified as an "Overhead, Credit and Expense Agreement" ("operating agreement"), is also dated December 4, 2000. The operating agreement is between Jump and Marina. It is signed by Schlossberg as President of Jump and Schiano as President of Marina.

A fourth document, identified as a "Unanimous Written Consent of the Directors and Shareholders of Marina, Inc." ("resolution"), is also dated December 4, 2000. The resolution states that directors and shareholders of Marina were elected for a one year term, that there are corporate share certificates, that Marina can open a bank account and that the actions taken and decisions made at the incorporators' organizational meeting are ratified. This agreement is signed by Schlossberg, as Director of Marina, Terry Friedman, another Director of Marina, Brown as Shareholder and Director and

Schiano as Shareholder. Schlossberg also signed the agreement as Shareholder of SF Enterprises.

The Marina employment agreement recites that "the Company" (Marina) desires to employ "Employee" (Schiano) as President and that "the Company will share office space with and/or obtain certain services from Jump Apparel, Inc. and its affiliated companies, (collectively referred to as "Jump"), and as a result Employee may have access to the proprietary information of Jump." The employment agreement further provides that Schiano shall serve as president of Marina commencing "on the date the Employee commences full time employment with the Company and shall continue for a period of 24 months after such commencement date, unless sooner terminated as herein provided."

The section pertaining to "Compensation" provides that Schiano's compensation as President consists of a base salary of $155,000 per annum and "[any] compensation payable to the Employee shall be payable in accordance with the general practice of the Company and/or Jump for executive employees..." The employment agreement states that Schiano "will be granted a five percent stock interest of the Company upon execution of this Agreement. Such stock interest shall be subject to the rights, limitations and restrictions of the Company's Shareholder's Agreement entered into simultaneously herewith by and among the Employee, the Company, Mark Brown and SF Enterprises Corporation (the "Shareholder's Agreement").

With respect to termination, the employment agreement states that it "shall be terminated upon the happening of [certain] events . . ." including "A. Whenever the Company and the Employee mutually agrees to in writing . . ." and "D. Employee leaves

employment of the Company." Other terminating events are death and disability.

Section 21 of the employment agreement deals with payment of Schiano's compensation:

> Jump Apparel, Inc. guarantees payment of Employee's salary during the two year term of this agreement, provided that in the event that Employee's employment with the Company terminates as a result of the cessation, winding down or termination of the business of the Company, Employee accepts any offer of employment Jump may make to Employee for employment with Jump for the remainder of such two year term upon terms no less favorable those contained herein and performs any required services in connection with such employment with Jump.

Schlossberg also signed the following Guarantee on Jump's behalf:

> Jump Apparel, Inc., a New York Corporation, unconditionally guarantee Jump guarantees the obligations of the Company with respect to payment of the Employee's salary during the initial two year term hereof. The foregoing guarantee shall continue in full force and effect notwithstanding the termination fo the business of the Company or the dissolution thereof, subject to the conditions set forth in Section 21 above.

The shareholders' agreement identifies Schiano as both "Nancy" and the "Group A Shareholder," Brown and SF Enterprises are referred to sometimes as "Group B Shareholder (s)" and Group A and B shareholders are collectively referred to as the "Shareholders." The total number of shares is 100, with 5 shares allocated to "Nancy," 15 to "Mark" and 80 to "SF." The board members include Schlossberg, Schiano, Brown and Terry Friedman. The following provisions of the shareholders' agreement are of particular relevance to the parties' dispute:

[* 7]

FIRST: MANAGEMENT AND OPERATION OF THE CORPORATION

A. For the duration of this AGREEMENT, the CORPORATION shall elect and continue in office as Directors of the CORPORATION, three (3) designees of the GROUP B SHAREHOLDERS, initially MARK [BROWN], GLENN SCHLOSSBERG and TERRY FRIEDMAN and the GROUP A SHAREHOLDER, so long as the GROUP A SHAREHOLDER is a SHAREHOLDER.

***

C. Checks and obligations

1. all cash, checks and instruments for the payment of monies are to be deposited in [Marina's] bank account" and "all checks drawn upon such accounts are to be signed as may be determined from time to time by the Board of Directors of [Marina]...

***

E. Employment

The CORPORATION agrees to employ the GROUP A SHAREHOLDER (Schiano) and retain the GROUP B SHAREHOLDERS as consultants to the CORPORATION so long as each is a SHAREHOLDER of the CORPORATION under the following terms and conditions:

1. NANCY shall enter into an employment agreement unpon the date hereof and shall render services to the CORPORATION in accordance with such agreement and any future agreements or any amendments thereto...

2. Each of the GROUP B SHAREHOLDERS agrees to devote as much of his time and attention to the business of the CORPORATION as the Board of Directors shall be deemed as necessary. The parties acknowledge that the GROUP B SHAREHOLDERS have or may have interests in other businesses which may be competitive with [Marina] and the GROUP B SHAREHOLDERS may devote time and attention to such other businesses and the same shall not constitute a breach of this Agreement...

***

3. In full payment for all services to be rendered by the GROUP B SHAREHOLDERS, they shall receive

> such salary [etc] . . . equal to the weekly salary or compensation paid to the GROUP A SHAREHOLDER (Schiano) pursuant to her employment agreement. Any annual compensation, remuneration, distribution, dividends, in excess of the compensation set forth in the GROUP A SHAREHOLDER's employment agreement shall be allocated 5% to the GROUP A SHAREHOLDER and the balance to the GROUP B SHAREHOLDERS (to be allocated among the GROUP B SHAREHOLDERS as they may determine).

A stock certificate was issued to Schiano reflecting that as of December 4, 2000, she had 200 shares (a 5% interest) in Marina. The certificate is signed by Schiano as President and Schlossberg as Secretary.

The shareholders' agreement was amended and restated as of October 29, 2001 when non-party Felice Hurwitz was brought in as co-president with Schiano but Schiano's percent interest in Marina did not change.

The "Term" of the employment agreement was later modified in an undated letter signed by Schlossberg as Marina's Chairman of the Board and Schiano in her individual capacity. The amendment states as follows:

> The term of this Agreement shall commence on the date the Employee commences full time employment with the Company and shall continue until November 1, 2003. Notwithstanding the foregoing or any other provision of this agreement, the guarantee of Jump Apparel, Inc. appended to this Agreement, which provides for Jump's guarantee of "the obligations of the Company with respect to payment of Employee's salary during the initial two year term" of the Employment Agreement shall expire on December 4, 2002 and Jump Apparel, Inc. shall have no further liability under the guarantee after that date. Except as expressly modified hereby, the Employment shall remain in full force and effect in accordance with its terms.

The operating agreement provides that Marina ("the Company") and Jump Apparel, Inc. ("Jump") agree that Jump will "provide to the Company [the] use of an undivided portion of its showroom and office space, as well as certain bookkeeping, accounting and other corporate back office services and other services related to the design production and shipping of goods for the Company..." The operating agreement calls for the two companies to share expenses and for Marina to "reimburse Jump for the cost of such services" on a monthly basis. Schlossberg signed the operating agreement as President of Jump and Schiano as President of Marina.

Schiano contends that Marina is a separate corporation, but that Schlossberg maintained *de facto* control of it. She also claims that Schlossberg and Brown intentionally ignored Marina's corporate entity and, instead, accounted for the business of Marina as a "division" of Jump. This was, according to Schiano, accomplished by, among other things, recording Marina's profits as profits of Jump. Schiano acknowledges she received paychecks from Jump, but claims this is because Jump guaranteed Marina's obligations with respect to payment of Schiano's salary. She also admits she had access to all of Jump's services (back office, etc.) but claims this working arrangement was an integral term of Marina's operating and employment agreements.

Schiano maintains that the parties continued performance of the employment agreement following its expiration in November 2003, thereby causing it to be impliedly renewed for one year intervals. While it is unrefuted that there were some minor adjustments in her pay, she claims this was an across the board 10% pay cut in 2002 and that all the material terms of the employment agreement remained otherwise

unmodified. Shiano contends this point – the existence of an employment agreement and renewal thereof – was already decided by the court in its prior order denying defendants' motion to dismiss (Order, Gische J., 7/14/09) ("prior order").

Schiano contends the shareholders' agreement was also effectuated because she was issued a stock certificate and the shareholder's agreement was amended and restated in 2001. Schiano provides documents showing that the New York State Department of Taxation and Finance issued Marina a corporate tax identification number in February 2001 and that in 2006, Marina filed a Business Corporation Biennial Statement. Marina also filed a "Continuing Guaranty" with the U.S. Consumer Product Safety Commission, attesting to the Marina's compliance with the Flammable Fabrics Act. The corporate biennial statement identifies Schlossberg as Marina's CEO and the federal document identifies Schiano as Marina's President.

According to Schiano, she demanded financial documents from Marina long before this litigation commenced but those demands were "deflected" because the Schlossberg and/or Brown did not want her to discover that Marina's corporate profits were being diverted. Although she filed her note of issue, Schiano nonetheless contends that her discovery demands in this case were stonewalled, a claim which the defendants vigorously deny.

Defendants argue that Marina was always operated as a "division" of Jump and it never operated independently. Schlossberg was deposed and offers his sworn affidavit in support. He states in his affidavit that:

> [It] made more sense to operate the Marina brand as a division of Jump (the "Marina Division"). It had always been contemplated that the Marina Brand would share

> some of the overhead with Jump so as to reduce the operating costs of running the Marina brand...we all agreed that it made more sense to operate it as a division rather than as a stand alone corporation because by doing so, none of the shareholders of Marina, Inc. had to access the cash that would be necessary to capitalize a separate business...we could forego the necessary capital infusion while relying upon the existing lending facility for Jump.

Defendants deny that Schiano ever satisfied a material term of the employment agreement, which was that she work full time for Marina. They rely on testimony by Schiano that Jump always paid her compensation, she never received a paycheck from Marina, Marina did not have a separate bank account and Jump issued annual W-2 statements to her. Schiano also testified that each year she filed tax returns she identified Jump as her employer.

Defendants argue that the employment agreement's integration clause bars its renewal. The clause relied on states as follows: "This instrument contains the entire agreement of the parties. It may not be changed orally but only by an agreement in writing signed by the party or parties against whom enforcement of any waiver, change, modification, extension or discharge is sought." Consequently, defendants contend that even if the employment agreement did go into effect, it was not and could not have been renewed without a separate writing. As further evidence that the employment agreement was not renewed and that Schiano was a Jump employee, Schlossberg points out that Schiano received benefits, such as health insurance, a retirement plan and 401 [k] which she was not entitled to under the employment agreement.

Schlossberg argues that he is not personally liable to Schiano because he did sign in an individual capacity and Jump is not a party to the employment agreement.

Concerning the shareholders' agreement, defendants argue that the agreement never went into effect because Marina did not maintain books and records, nor did Marina make any sales, etc. Defendants also claim Schiano has no claim for damages because even if the shareholders' agreement did go into effect, she was restricted to the relief set forth in the agreement.

Discussion

Initially, the court addresses the issue raised by Schiano, that this court's prior order is "collateral estoppel" on the issue of whether there is an employment agreement and whether it was renewed. There are two basic requirements for invoking the equitable principle of collateral estoppel: (1) the identical issue was necessarily decided in another proceeding, it is decisive of the present action, and (2) the parties had a full and fair opportunity to contest that issue in the other proceeding (D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659 [1990]). The is doctrine clearly has no application to the facts presented and what Schiano apparently means is that the prior order is the "law of the case" (Glynwill Investments, N.V. v. Shearson Lehman Hutton, Inc., 216 A.D.2d 78 [1st Dept 1995]). That argument, however, is also an incorrect statement of the relationship between the court's prior order and the motion presently before the court.

The court's prior order was in connection with a pre-answer motion to dismiss. The standard of proof on a motion to dismiss is very different than that on a motion for summary judgment. When deciding a motion to dismiss, the pleading is liberally construed and the court has to determine whether, affording the plaintiff the benefit of every possible favorable inference, the facts, as alleged, fit within any cognizable legal

theory (Leon v. Martinez, 84 N.Y.2d 83 [1994]). Whether the plaintiff can ultimately establish its allegations is not part of the calculus" (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 [2005]).

By contrast, where a party seeks summary judgment, the movant bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Only if this burden is met will it then shift to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Santiago v. Filstein, 35 AD3d 184 [1st Dept 2006]). In deciding the motion to dismiss, the court only decided that the complaint contained sufficient facts to support the claim asserted, not that Schiano had proved any of her claims. Now that issue has been joined and defendants have moved for summary judgment, the court must decide whether they are entitled to summary judgment, as a matter of law or whether a trial is necessary because there are disputed material issues of fact.

While acknowledging that there are several documents executed at or about the time that Marina was incorporated, including the employment agreement Schiano contends was breached, defendants deny that any of these agreements were ever "effectuated." The employment agreement was never annulled, vacated or voided however and therefore, the issue is whether Schiano ever "worked" for Marina or was an at-will-employee of Jump. Payment of Schiano's remuneration by Jump is not inconsistent with the terms of the employment contract because Jump specifically

guaranteed payment of her wages through December 2002. Furthermore Schiano's identification of her employer as Jump on her tax filings is wholly consistent with the pay stubs and wage statements that were issued to her. The operating agreement specifically provides that Marina will share office space with Jump and take advantage of Jump's bookkeeping, accounting and other corporate back office services, as well as other services related to the design production and shipping of goods for Marina. None of the documents and circumstances that defendants rely to prove that Schiano did not work for Marina eliminate all material triable factual issues about whether Schiano was fulfilling her contractual obligations to Marina or was a Jump employee. Therefore, defendants' motion to dismiss the 1st cause of action for breach of contract against Marina is denied. To the extent that this claim is also asserted against Jump and Schlossberg, that branch of the motion is discussed separately, later on in this decision.

Defendants next argue that even if the employment agreement was effectuated, it expired by its terms on November 1, 2003 and was never renewed. The common-law rule is that where a contract employee continues to work after the expiration of the employment contract there is a presumption that the agreement was renewed for one additional year term at a time so as to not run afoul of the Statute of Frauds (GOL 5-701) *see* Cinefot Intl. Corp. v. Hudson Photographic Indus., 13 N.Y.2d 249, 252 [1963] *internal citations omitted*). This presumption may be rebutted by demonstrating that the parties did not intend to allow a contract to renew automatically (Goldman v. White Plains Center for Nursing Care, LLC, 11 N.Y.3d 173 [2008]).

Schiano's employment agreement states that it "may not be changed orally but only by an agreement in writing signed by the party or parties against whom

enforcement of any waiver, change, modification, extension or discharge is sought." Here, however, there was no oral "change" nor was it "extended" - - the only "extension" was in the undated agreement that extended the original two year term to November 2003. After the employment agreement expired in due course, Marina allowed Schiano to keep working.

There is nothing in the Marina employment agreement that signals the parties intention not to renew the employment arrangement or that it was non-renewable *(compare* Goldman v. White Plains Center for Nursing Care, LLC, *supra; also* Wood v. Long Island Pipe Supply, Inc., 82 AD3d 1088 [2nd Dept 2011]). This is in contrast to the amendment to the employment agreement, which specifically provides that Jump's guaranty "shall expire on December 4, 2002 and Jump Apparel, Inc. shall have no further liability under the guarantee after that date..." Thus, defendants have failed to prove that, as a matter of law, the employment agreement was not impliedly renewed by the parties through their mutual course of conduct after it expired.

Defendants specifically acknowledge (Corrigan Affid) that Marina engaged in certain "transactions" but they claim those transactions were accounted in terms of Marina being a division or brand of Jump. A division is an unincorporated entity having no separate legal existence and, therefore, incapable of bringing a law suit or being sued in its own name (see Sheldon v. Kimberly-Clark Corp., 111 A.D.2d 912 [2nd Dept.1985]). A "brand" is typically a name, logo or product design that can be trademarked. Here, however, Marina is a separate and distinct corporation, capable of making contracts, enforcing them and having them enforced against it (see Maranatha Associates Inc. v. Titan Group Inc., 202 A.D.2d 846 [3rd Dept. 1994]). Therefore, even

if, as defendants claim, Marina was not profitable, this does not mean its agreements are unenforceable.

The issues involving "employers," "employees" and "employment" can be complicated (see Thompson v. Grumman Aerospace Corp., 78 NY2d 553 [1991]; Suits v. City of New York, 12 Misc3d 1156 [A] [Sup Ct, N.Y. Co. 2006] *discussing general employment and special employment*). Who pays an employees salary is not decision of whether that entity is the "employer." Here, these matters are further complicated by the fact that employment and shareholders' agreements have interlocking provisions about "employment." The duties that a corporation owes to a minority shareholder are distinct from any duty it may owe to that shareholder as an employee (see Ingle v. Glamore Motor Sales, Inc., 73 NY2d 183 [1989]).

Schiano and defendants have a vigorous disagreement about whether the doctrine of piercing the corporate veil applies to the facts of this case. Both sides present somewhat confused, confusing and convoluted arguments about why this doctrine should or should not be applied. What Schiano claims is that Schlossberg used Jump to dominate and control Marina and, therefore, the court should disregard Jump's corporate form so that Schiano can reach Schlossberg, individually.

The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation" (Morris v. New York State Dept. of Taxation and Finance, 82 N.Y.2d 135, 141 [1993]). "The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed" (Morris v. New York State Dept. of Taxation and

Finance, 82 N.Y.2d at 141). Piercing the corporate veil requires "a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury..." (Morris v. New York State Dept. of Taxation and Finance, supra).

Jump is not a party to the Marina employment agreement or the shareholders' agreement. Jump only guaranteed "payment of Employee's salary during the two year term" of the employment agreement. Thus, Jump only undertook and assumed the obligation of making sure Schiano was paid her compensation. Not only is Jump not a party to either the employment or shareholders' agreements, Schiano has also failed to come forward with triable issues of fact that Schlossberg used Jump as a mere device to further his personal, rather than corporate business, or that such domination was used to commit a fraud or wrong against her (Id). Therefore, defendants' motion to dismiss the employment agreement based claims against Schlossberg is granted as they have sustained their burden in this regard.

To the extent that Schiano claims Jump, a guarantor, is responsible for any payment of compensation, etc., that Marina owed to her but did not pay, Jump's motion for summary judgment on the 1st cause of action against Jump is denied. To the extent, however, that Schiano claims Jump or Schlossberg, acting on behalf of Jump, breached the employment agreement, defendants' motion for summary judgment is granted and those particular claims are severed and dismissed.

Schiano's claim for breach of the shareholders' agreement (2nd cause of action) is based on allegations that Brown caused dividends, bonuses or other remuneration to

be paid to himself "on account of Marina's profitability without proportionally compensating Schiano." Defendants deny any dividends were paid or that Marina had any profit. They claim further, in any event, that Schiano cannot prove her damages.

Article Fourth of the shareholders' agreement pertains to valuation of shares. It provides that the "SHAREHOLDERS intend to meet from time to time in order to fix an evaluation of all of the shares issued and outstanding of the CORPORATION . . ." Article Fourth further provides that "the purchase price of a selling SHAREHOLDER'S shares offered pursuant to Article "THIRD" shall be greater of (i) the book value of said shares as of the end of the month in which the offer to sell was made; or (ii) One Hundred Dollars ($100) for the entire stock interest of the SHAREHOLDER."

Here, Shiano did not "sell" her shares nor did she voluntarily withdraw from Marina; she was fired. The shareholders' agreement makes specific reference to any "annual compensation, remuneration, distribution, **dividends**, in excess of the compensation set forth in the GROUP A SHAREHOLDER's employment agreement..." (*emphasis added*), stating that such monies "shall be allocated 5% to the GROUP A SHAREHOLDER and the balance to the GROUP B SHAREHOLDERS (to be allocated among the GROUP B SHAREHOLDERS as they may determine)."

While defendants deny any dividends were paid because Marina was never capitalized, Marina was unprofitable, all of Marina's transactions were accounted for as a division of Jump, and none of the other shareholders received dividends, distributions or bonuses, they have the burden of proving these claims. Summary judgment will only be granted if there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law (Friends of Animals v.

Associated Fur Mfrs., 46 N.Y.2d 1065 [1979]). Defendants have not met that burden and it cannot be satisfied by simply pointing to weaknesses in Schiano's case or her opposition. Therefore, the motion to dismiss the 2nd cause of action against Brown is denied.

Schiano's third cause of action is against Schlossberg for breach of fiduciary duty. She claims that "by reason of his position as President of Jump and Chairman of the Board of Marina and by reason of his *de facto* control of Marina, Schlossberg was obligated to deal fairly and honestly with Schiano in all aspects of the management of Marina and to otherwise perform his duties in good faith ..." Schiano claims further that Schlossberg breached his duties "by engaging in the improper and fraudulent practices described herein" which include accounting for the business of Marina as a "division" of Jump. These claims and the claims set forth against Schlossberg (and Jump) in the 1st cause of action have similar underpinnings (see decision, *supra*).

A plaintiff/stockholder may sue in his or her individual capacity if s/he has suffered an injury that is either separate and distinct from the injury suffered by the corporation or if the injury arises out of a violation of a special duty running from the alleged wrongdoer directly to the stockholder and that special duty is independent and extrinsic to the corporation[2] (see, Abrams v. Donati, 66 N.Y.2d 951, 953 [1985]) see, Abrams v. Donati, 66 N.Y.2d 951, 953 [1985]).

Although Schiano contends Schlossberg's actions were a breach of his fiduciary

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[2]The answer does not raise standing as an affirmative defense. Therefore, any argument that Schiano's claim is strictly derivative was waived (see, Abrams v. Donati, 66 N.Y.2d 951, 953 [1985]).

duty to her because he engaged in a pattern of self-dealing, Schlossberg is not a shareholder in Marina – SF Enterprises is. Schlossberg is, however, an officer of SF Enterprises, as well as of Marina. Thus, what Schiano is trying to do is disregard the corporate form of SF Enterprises to reach Schlossberg in his individual capacity - - exactly what she hoped to do with Jump (see decision, *supra*). For the same reasons that Schiano cannot reach Schlossberg through Jump, she cannot reach Schlossberg through SF Enterprises. Consequently, the third cause of action against Schlossberg fails and defendants' motion for granted summary judgment dismissing that claim is granted.

Whether or not, as Schiano claims, defendants stonewalled her discovery demands, Schiano filed her note of issue indicating this case is ready for trial and discovery was either completed or not required. No motion to enforce discovery or discovery sanctions (i.e. CPLR 3124, 3126) was made by her and, therefore, Schiano's claims about lack of discovery are unavailing.

Conclusion

Defendants' motion is granted in part and denied in part as follows:

The motion is denied as to the 1st cause of action against Marina. However, the motion for summary judgment on the 1st cause of action against Schlossberg is granted and that claim is severed and dismissed as against him. The motion for summary judgment dismissing the 1st cause of action against Jump is granted to the extent Schiano contends Jump breach the employment agreement, but denied to the extent that Jump was obligated as a guarantor. The motion for summary judgment dismissing the 1st cause of action against Schlossberg is granted and the claim as to him is

severed and dismissed.

The defendants' motion for summary judgment on the 2nd cause of action against Brown is denied. This cause of action was previously dismissed as against Schlossberg (Order, Gische J., 7/14/2009).

The defendants' motion for summary judgment on the 3rd cause of action against Brown is granted and that claim is severed and dismissed.

This case is ready to be tried once Mediation is completed. Schiano shall serve a copy of this order on the Clerk in the Office of Trial Support so the case can be scheduled.

To the extent that defendants have requested any other relief that has not been specifically addressed, it is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 30, 2012

So Ordered;

Hon. Judith J. Gische, JSC

FILED

MAY 02 2012

NEW YORK
COUNTY CLERK'S OFFICE