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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN PART 1
Justice

John M. Ferolito, et al,

INDEX NO. 600396/08

MOTION DATE

- v -

MOTION SEQ. NO. 032

Domenick J. Vultaggio, et al.

MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this motion to enforce ESE Decision

	PAPERS NUMBERED
Plaintiff Ferolito's Revised Notice of Motion – Affidavit – Exhibits 1-35	1, 2
Solomon Aff. in Opp. (1/13/12) – Exhibits 1-7	3
Barrett Reply Aff. (1/19/12) – Exhibits A-E	4
Vultaggio Opp. Aff. (4/30/12)	5
Menashi Opp. Aff. (4/30/12)	6
Debella Opp. Aff. (5/1/12) – Exhibits 1-5	7
Solomon Opp. Aff. (5/1/12) - Exhibits 1-216 (Volumes I - IV)	8
Barrett Supp. Reply Aff. (5/7/12)	9
Gravante Supp. Reply Aff. (5/7/12) - Exhibits 36-41 (at Supp. Mem. of Law)	10

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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Dated: August 1, 2012

Martin Shulman, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

_____X

JOHN M. FEROLITO, et al.,

Plaintiffs,

-against-

Index No. 600396/08

DOMENICK J. VULTAGGIO, et al.,

Defendants.

_____X

DOMENICK J. VULTAGGIO, et al.,

Counterclaim and Third Party Plaintiffs,

-against-

JOHN M. FEROLITO, et al.,

Counterclaim and Third Party Defendants.

_____X

In the Matter of the Application of John M. Ferolito,

Petitioner,

For the Dissolution of Beverage Marketing USA, Inc., a Domestic Corporation.

_____X

Hon. Martin Shulman, JSC:

This action involves an ownership struggle between two competing groups – the Ferolito parties ("Ferolito") and the Vultaggio parties ("Vultaggio") – who own a beverage business, referred to here as the AriZona Entities (or "AriZona"), which manufactures and distributes the AriZona iced tea brand of beverages. The varied actions now pending include a Business Corporation Law (BCL) §1118 valuation

proceeding to determine the fair value of John M. Ferolito's ("JMF") shares in Beverage Marketing USA, Inc. ("BMU"). The brief underlying factual and procedural background has been detailed in this court's earlier Interim Decision, dated April 16, 2012. The defined terms used in the Interim Decision are incorporated here.

In Motion Sequence No. 32, Ferolito moves for prospective equitable relief, *viz.*, a permanent mandatory injunction purportedly to enforce this court's earlier decision, *Ferolito v Vultaggio*, 2010 WL 7373758 (Sup Ct NY Co 2010)("ESE Decision"[1]),*affd*, 85 AD3d 636 (1st Dept 2011), or in the alternative, moves for partial summary judgment on Count III of the First Amended Complaint. Vultaggio opposes the motion.

In support of this motion, Ferolito reminds this court of bench rulings it *sua sponte* issued in 2009 prior to the ESE Decision which directed Vultaggio to allow JMF to participate in major corporate decision-making (see Exhibits 9 and 10 to Ferolito Motion).

However, it is important to appreciate the context in which the parties advanced their arguments about this management issue in extensive colloquy during varied in-court conferences early on in this litigation. At that time, there were no outcome-determinative decisions, but rather mediated *pendente lite* stipulations and *sua sponte* judicial directives. Specifically, the foregoing directives to resolve this impasse and other issues were based on this court's perceived practicalities to try to preserve the peace during this hotly litigated war between the parties. These rulings were not issued to dispose of varied motions for relief based on any developed record.

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[1] JMF, on behalf of Ferolito, argues that notwithstanding that no Employment Separation Event ("ESE") has occurred as the affirmed ESE decision held, Vultaggio still continues to deny him and Ferolito the right guaranteed by §3.1 of the Owners' Agreement that "all material matters" affecting the AriZona Entities can and must be "resolved by mutual agreement" of the two owner groups.

However, with Ferolito renewing its motion for injunctive relief, albeit prospectively, and/or alternatively seeking partial summary judgment again, this court must now search an up-to-date record using a more refined judicial lens to sustain or overrule any claimed right. In other words, this court's then pragmatic directives to Vultaggio to adhere to Section 3.1 of the Owners Agreement are wholly inapplicable and therefore Ferolito may not resort to the law of the case doctrine on this motion.

Thus, on this round of motion practice, Ferolito simply does not meet the requisite burden for demonstrating entitlement to this injunctive relief. The law is clear that a permanent injunction is a "drastic remedy". *See Sybron Corp. v Wetzel*, 46 NY2d 197, 204 (1978); *Parry v Murphy*, 79 AD3d 713, 715 (2d Dept 2010). It is a drastic remedy "normally only granted after trial" (*Moore v Ruback's Grove Campers' Assn., Inc.*, 85 AD3d 1220, 1221 [3rd Dept 2011]). And it is a drastic remedy awarded to a moving party who has "*actually succeed[ed] on the merits of the case*, rather than merely demonstrate[d] that success is likely in a future proceeding." *Weizmann Inst. of Science v Neschis*, 229 FSupp 2d 234, 258 (SDNY 2002) (emphasis added). Well settled is the notion that a movant must also satisfy an additional two prongs by showing that there would be (1) irreparable injury absent the granting of injunctive relief, and (2) a balancing of the equities in the movant's favor.

On the record now before this court, Ferolito has failed to satisfy the high threshold required to obtain such extraordinary relief. More to the point, Ferolito cannot show that its case has "actually succeeded" on the merits. And on a record rife with "issues of fact", a claim for a permanent injunction cannot "be resolved on the basis of the papers submitted" and can "only [be] issued after a full trial". *Byrne Compressed Air*

Equip. Co., Inc. v Sperdini, 123 AD2d 368, 369 (2d Dept 1986) (reversing permanent injunction and declining to issue preliminary injunction).[2]

Emphatically stated, in finding that no ESE had occurred, this court made no declarations regarding Ferolito's management rights. Contrarily, this court denied Ferolito summary judgment as to liability on Count III of the First Amended Complaint, implicitly finding the existence of material issues of fact as to Ferolito's alleged claim that Vultaggio contractually violated §3.1 of the Owners' Agreement.

Notably, the ESE decision clearly highlighted JMF's inconsistent posturing:

> Ferolito cannot aver that he has had but nominal involvement in the operations of the AriZona entities since before the Owner's Agreement was entered into, and expect this court to rule as a matter of law that he was damaged because Vultaggio prevented him from participating in management decisions.

As further gleaned from the then underlying record and noted in the ESE Decision: Count III of the First Amended Complaint sought monetary damages and injunctive relief due to Vultaggio's alleged breaches of the corporate governance provisions of the Owners' Agreement; indisputably, JMF, in a sworn affidavit, then averred to substantially reducing his role in the management of the AriZona entities and maintaining that financially lucrative passive role even after executing the Owner's Agreement; and implicit from that same record was a lack of sufficient evidence to persuade the court to either award any interim injunctive relief let alone summary judgment grounded on Ferolito's claimed irreparable harm due to Vultaggio making unilateral corporate decisions in operating the profitable AriZona entities.

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[2] *Cf. Weissman v Kubasek,* 112 AD2d 1086, 1087 (2d Dept 1985) (Mayoral candidates were found to have made a sufficient showing to warrant grant of preliminary injunctive relief, but not permanent injunctive relief).

Now, on this more developed record, this court can also consider various judicial admissions made as part of the record in a related action in Supreme Court, Nassau County, which evidently undermines Ferolito's perceived harm. Illustratively, JMF duly acknowledged the existence of the "One Captain Agreement", an oral agreement in which JMF left the running of AriZona to Vultaggio: "I left Don Vultaggio and I let him do his thing because I did it for the first 20-some odd years. I let him be king." (*See* JMF EBT Tr at 61:6-9 as Volume I, Exhibit 17 to Solomon Opp. Aff.). And during the trial in the Nassau County action, Richard M. Adonailo, to whom Ferolito had entrusted full power of attorney, testified that he was aware of the "One Captain Agreement" between the parties, that it was reached prior to the Owners' Agreement, and that it continued to be an Agreement between the parties after the Owners' Agreement was signed. *See* Trial Tr at 2510:19-25, through 2511:1-3 as Volume I, Exhibit 1 to Solomon Opp. Aff.[3]

Based on the foregoing, JMF and Ferolito simply fail to demonstrate that they suffered, and will continue to suffer, irreparable harm unless they are granted a permanent mandatory injunction to prospectively weigh in on all material AriZona matters during the pendency of the valuation proceeding triggered by BMU's right of election pursuant to BCL §1118. Consequently, Ferolito did not show then, and has not shown now, that "he was damaged because Vultaggio prevented him from participating in management decisions."

Moreover, except for conclusory assertions here, without more, JMF and Ferolito have not only failed to demonstrate that their claimed injuries from perceived long-

[3] This and other judicial admissions JMF and other supporting witnesses made were generated during the course of a bench trial to dispose of Vultaggio's counterclaims filed in the related Nassau County action now rendered moot (*see JMF Consulting Group II, Inc. v Beverage Mktg. USA, Inc.*, __ AD3d __, 2012 NY WL 2580400 [2d Dept 2012]).

standing marginalization are irreparable, *viz.*, for which they cannot be fully compensated by money damages at law (*see 306 Rutledge, LLC v City of New York*, 90 AD3d 1026, 1028 [2d Dept 2011]; *see also, Sperry Intl. Trade, Inc. v Government of Israel*, 670 F2d 8, 12 [2d Cir 1982]), but JMF has also made no showing at this juncture that being "out of the loop" will adversely affect the valuation of his BMU shares. Contrarily, JMF and Ferolito have steadfastly maintained that their collective interests in BMU/AriZona are worth billions of dollars and intend to prove same at trial in the valuation proceeding.

Ferolito has also not demonstrated the second prong, that of balancing the equities in his favor, without which his application must be denied. CPLR §6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 (1990); *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 (2005). "In balancing the equities, the court should consider various factors, including . . . whether plaintiff has unclean hands." *United for Peace & Justice v Bloomberg*, 5 Misc3d 845, 849-850, NY Slip Op 24389 (Sup Ct NY Co 2004) ("[P]laintiff's delay in coming to court, and its decision to renege on its [earlier] commitment, demonstrate that it lacks the clean hands that are a prerequisite for the grant of equitable relief - regardless of any alleged or even actual wrong attributable to defendants"). "He who comes to equity must come with clean hands" and unclean hands may bar injunctive relief concerning enforcement of a shareholders' agreement. *Amarant v D'Antonio*, 197 AD2d 432, 434 (1st Dept 1993). Illustrative of JMF's unclean hands was JMF's calculated violation of the transfer covenants contained in the Owners' Agreement which this court found "border[ed] on the unconscionable." *See Ferolito v Vultaggio*, 2009 NY Misc LEXIS 5806 [*7](Sup Ct NY Co 2009), *affd*, 78 AD3d

529 (1st Dept 2010). Thus, this court is precluded from finding the equities favorably balance toward Ferolito.

In any event, any right JMF might otherwise have had to meaningfully participate in the corporate governance of AriZona on his behalf and that of Ferolito, for all intents and purposes, ended when he petitioned for BMU's dissolution. This point is underscored by the *ratio decidendi* underlying a recent Appellate Division, First Department decision that affirmed this court's earlier ruling that BMU's BCL §1118 election to purchase Ferolito's shares was valid. In *Ferolito v Vultaggio*, __AD3d__, 2012 WL 3007256, at *4 (1st Dept 2012), the Appellate Division, *inter alia*, unanimously held that:

> [t]o adopt Ferolito's argument that a shareholder who commenced a judicial dissolution proceeding can continue to assert management rights with respect to the corporation's right of election pursuant to BCL § 1118 would thwart the statutory purpose of promoting the continuation of corporate enterprises . . . Simply put, without an explicit and unequivocal agreement to the contrary, a shareholder who petitions for dissolution should not have the ability to veto the corporation's election rights. To do so would fly in the face of logic as well as the purposes of the statutory scheme enacted by the Legislature (citations omitted).

True, the foregoing directly addressed foreclosing a petitioner-shareholder from using contractual management rights to adversely affect a BCL §1118 election. But, it is also not unreasonable to expand this holding under these circumstances to infer that Ferolito's petition for dissolution should limit his rights under the Owners' Agreement such that he no longer has the right to weigh in on major managerial decisions to which he otherwise would have been entitled. This expanded inference would be consistent with New York law. To amplify:

> [A] shareholder, officer and director of a close corporation, [i]s subject to a standard of honesty and good faith which require[s] that he devote his undivided and unqualified loyalty to the corporation. The fiduciary duty imposed on him prevent[s] him from placing private interests in conflict with those of the corporation.

Fender v Prescott, 101 AD2d 418, 422 (1st Dept 1984), *aff'd*, 64 NY2d 1079 (1985).

However, when an individual files for dissolution, that individual's ability to carry out his fiduciary duties is clearly compromised. "An action for dissolution, however, the aim of which is to end the corporate life, cannot possibly benefit the corporation . . ." *Fontheim v Walker*, 282 AD 373, 375 (1st Dept 1953), *affd*, 306 NY 926 (1954). Stated more sharply, a shareholder's petition to dissolve the corporation expressly evidences that the disgruntled shareholder "has no further interest in [the] continuation of the corporation aside from being paid for [his] shares". *Matter of Delinko*, NYLJ Apr 27, 1981, at p. 6, col. 2 (Sup Ct NY Co)(*see* Vol III, Exhibit 130 to Solomon Opp Aff).[4] In this separate vein, the permanent injunctive relief Ferolito seeks must be denied.

With respect to Ferolito's alternative request for partial summary judgment on Count III of the First Amended Complaint, New York law has a "strong policy against allowing successive motions for summary judgment". *Baron v Charles Azzue, Inc.*, 240 AD2d 447, 449 (2d Dept 1997). This is particularly true where the motion is based on legal grounds and factual assertions that were or could have been raised in an earlier

[4] There appears to be no legal authority for the notion that a shareholder who has petitioned for dissolution ought to be permitted to maintain any role in major corporate decision-making and exercise management rights he/she may have had in the company sought to be dissolved. Ferolito's reliance on *Slade v Endervelt*, 174 AD2d 389 (1st Dept 1991) on this point is misplaced as that case only dealt with a petitioner-shareholder's *economic* rights as they relate to the value of his shares. *Id.* at 390-91 (after election, petitioner still has standing to bring a derivative action). A shareholder's right to preserve/protect a financial interest is quite different from that of a petitioner shareholder trying to maintain the right to participate in corporate management, "veto" business decisions or even control a corporation's response to a dissolution petition.

motion. *Levitz v Robbins Music Corp.*, 17 AD2d 801, 801 (1st Dept 1962) ("Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment"); *Phoenix Four, Inc. v. Albertini*, 245 AD2d 166, 167 (1st Dept 1997) ("The IAS court properly denied the plaintiff's motion for summary judgment since the motion was based on matters that could have been but were not raised in an earlier summary judgment motion by plaintiff's predecessor in interest"). Indeed, "[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification." *Jones v 636 Holding Corp.*, 73 AD3d 409, 409 (1st Dept 2010).

As stated earlier, the ESE Decision denied Ferolito's prior motion for summary judgment on the issue of liability on Count III of the First Amended Complaint which sought "damages and injunctive relief based on allegations that Vultaggio breached the Owners' Agreement by preventing Ferolito from participating in management decisions." *Ferolito v Vultaggio*, 2010 WL 7373758, *supra*.

In response, Ferolito argues that "[t]he rule against successive summary judgment motions does not apply because the instant motion seeks different relief on different legal grounds than did the summary judgment motion that was denied in the ESE Decision." Ferolito insists that the earlier ESE Decision ruled solely on *money damages* relating to Vultaggio's past breaches and thus did not foreclose *prospective* relief.

Despite Ferolito's clever attempt to sidestep the problem posed by the rule against successive summary judgment motions, this motion is quite obviously based on

legal grounds and factual assertions that were or could have been raised in earlier motion practice. Since denying Ferolito's first motion on the merits after finding disputed issues of fact, this court finds no new evidence demonstrating any noteworthy change warranting reconsideration.[5] Thus, absent any legal or factual basis for revisiting the issues, this court denies Ferolito's motion for partial summary judgment on the grounds that it runs contrary to the rule against successive motions for summary judgment. *Hoffeld v Lindholm*, 85 AD3d 635, 635 (1st Dept 2011); *Batac v Assoc. Sec. Specialists*, 183 AD2d 678, 679 (1st Dept 1992); *Ferolito v Vultaggio*, __AD3d__, 2012 WL 3007256, *supra*.

Even if JMF had managed to adduce new evidence that gave this court pause as to its earlier judgment, which he did not, Ferolito's attempt to relitigate the issue would nonetheless be barred by the law of the case, given JMF did not appeal the ESE Decision's prior ruling denying summary judgment. Removing any room for doubt, reference to this ruling was reiterated in open court colloquy shortly after the issuance of the ESE Decision:

> [W]ith respect to denying the branch of the motion for summary judgment respecting the findings of liability on the third count as a matter of law, it's an open question. There are material issues of fact here . . .

(*See* Court Tr at 49:11-15 as Vol I, Exhibit 5 to Solomon Opp Aff).

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[5] A cursory review of the transcripts of the recently concluded trial in Nassau County, as well as from ongoing discovery, suggests that Ferolito's purpose in campaigning for involvement in management decisions is simply to cause a stalemate to force Vultaggio to agree to the sale of the AriZona Entities. Again, the current posture of this litigation simply forecloses Ferolito from disrupting the manner in which AriZona is being operated during pendency of the valuation proceeding. Ultimately, Ferolito will be afforded a full and fair opportunity to prove Vultaggio's alleged breaches of §3.1 of the Owners' Agreement and whether these breaches adversely affected the value of BMU shares.

Pursuant to the law of the case, this court finds another legal ground to deny this alternative prayer for relief. *See Levitz*, 17 AD2d at 801 ("denial of the original motion for summary judgment established the law of the case and required the denial of the subsequent motion"); *CDR Créances S.A.S. v. Cohen,* 77 AD3d 489, 490-91 (1st Dept 2010) (defendant's arguments "had been raised previously and rejected, and since no appeal was taken from those determinations, are precluded by the doctrine of law of the case").

Needless to say, even if this motion was not barred by the rule against successive summary judgment motions and the law of the case, it is clear that summary judgment requires meeting a high threshold. Specifically, the law describes it as:

> [A] drastic remedy, to be granted only where a moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" and then only if, upon the moving party's meeting of this burden, the non-moving party fails to "establish the existence of material issues of fact which require a trial of the action". The moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*".

Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012)(citations omitted; emphasis in original) (affirming denial of summary judgment). Additionally, a "motion for summary judgment shall . . . show that there is no defense to the cause of action or that the cause of action or defense has no merit." CPLR 3212(b). Here, Ferolito fails to establish its right to partial summary judgment on Count III of the First Amended Complaint for breach of contract based on Vultaggio allegedly depriving JMF of management rights for the same reasons this court denied Ferolito permanent injunctive relief.

This court has considered the remaining arguments and finds them to be without merit. Accordingly, it is

ORDERED that motion sequence 32 is denied.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
August 1, 2012

Hon. Martin Shulman, JSC