SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 111011/2010
PETER'S NECESSITIES FOR PETS
vs.
PETS NECESSITIES, LTD.
SEQUENCE NUMBER : 004
PRECLUDE

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

denied as moot for the reasons set forth in the trial decision.

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

Dated: 12/30/13

SHIRLEY WERNER KORNREICH J.S.C., 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: PART 54

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PETER'S NECESSITIES FOR PETS L.P. and PETER'S EMPORIUM FOR PETS 1 LLC,

Index No.: 111011/2010

DECISION & ORDER

Plaintiffs,

-against-

PETS NECESSITIES, LTD., CENTER FOR VETERINARY CARE, P.C., PAUL SCHWARTZ and GENE SOLOMON,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

I. Background

The undisputed material facts were set forth by the court in its decision on the summary judgment motion, dated July 16, 2012 (NYSCEF Doc. No. 23) (the SJ Decision) and were substantiated by the trial evidence:[1]

> Schwartz and Solomon are veterinarians who have conducted their practice through CVC since 1988. They also ran PNL, a pet supplies store at the same location as their practice. On October 1, 1988, Schwartz entered into a 15 year lease with 238 E. 75th Associates (the Landlord) for office space located at 236 East 75th Street, New York, NY (the 1988 Lease). On October 18, 1988, Schwartz assigned the 1988 Lease to CVC with the consent of the Landlord. On May 27, 1999, the 1988 Lease was extended for five years until September 30, 2008 and amended to decrease the rent payments (the 1999 Amendment).
>
> On April 1, 2001, the Partnership was formed when Peter's Emporium for Pets, Inc. (a predecessor to plaintiff Peter's Emporium for Pets 1 LLC (PEP)) entered into a Partnership Agreement with PNL whereby PEP and PNL obtained a 51% and a 49% partnership interest respectively. PEP was another pet supplies store that was located about a block away from PNL. The Partnership immediately

[1] All defined terms shall have the same meaning as set forth in the SJ Decision.

began operating in the space formerly used by PNL at the 236 East 75th Street location (the Retail Space).

On June 16, 2003, CVC and the Landlord executed a Second Amendment of Lease (the 2003 Amendment) that further extended the 1988 Lease for another five years to September 30, 2013. In 2004, the Partnership and CVC entered into a written sublease agreement (the Sublease) that was backdated to April 1, 2001. The Sublease governed the Partnership's use of the Retail Space and ran through August 30, 2013. The Sublease references the 1988 Lease, but does not reference either the 1999 Amendment or the 2003 Amendment. The Sublease sets the Partnership's rent at $42,300, payable in equal monthly installments of $3,525, and calls for an 8% annual rent increase and for the payment of 25% of CVC's real estate taxes and utilities.

The fundamental allegation in this case is that Defendants' failure to disclose the existence of the terms of the 1999 Amendment, whereby CVC's rent was reduced, was wrongful because it led to the Partnership paying more in rent than it would have agreed to if it had known about the 1999 Amendment. This allegation is pled under causes of action for breach of the Partnership Agreement, breach of fiduciary duty, unjust enrichment, and rescission of the Partnership Agreement.

SJ Decision at 1-3.

The court dismissed all of plaintiffs' claims except breach of fiduciary duty, for which the court granted summary judgment on liability to plaintiffs. The court explained:

PEP claims that PNL's failure to disclose the 1999 Amendment constituted a breach of fiduciary duty at the time of the execution of the Partnership Agreement in 2001 and at the time of the execution of the Sublease in 2004. The issue of whether a breach occurred in 2001 is not particularly important since by 2004, the parties clearly were fiduciaries and the Sublease related back to the beginning of the Partnership's occupancy of the Retail Space in 2001. The sole relevant inquiry is whether as a fiduciary, PNL was allowed to withhold knowledge of the 1999 Amendment and make a profit on the Sublease without disclosure to PEP.

The answer is clearly no. PNL and its principals are not entitled to make a secret profit off a contract with the Partnership without disclosure to PEP. Hence, the Court grants summary judgment to plaintiffs on their breach of fiduciary duty

> claim to the extent that such duty was breached by PNL by failing to disclose the 1999 Amendment in conjunction with the execution of the Sublease.

SJ Decision at 5.

However, the court denied summary judgment on damages:

> [T]here is a question of fact as to damages, as there is conflicting evidence in the record as to *whether having knowledge of the 1999 Amendment would have caused PEP to negotiate a different rent.* The deposition testimony of Peter Sontag, the owner of PEP, suggests that *he was not particularly concerned about the rent the Partnership would be paying to occupy the Retail Space.* Nevertheless, in reviewing the record in the light most favorable to plaintiffs, it is not clear *whether disclosure of the 1999 Amendment would have led to the Partnership paying a lower rent.* Therefore, summary judgment is denied on this issue.

SJ Decision at 5-6 (emphasis added). Hence, if, at trial, the court found that "disclosure of the 1999 Amendment would [not] have led to the Partnership paying a lower rent," the court would not award any damages to plaintiffs. In an order dated May 21, 2013, the Appellate Division affirmed the court's summary judgment ruling on the breach of fiduciary claim.[2] *See Peter's Necessities for Pets, L.P. v Pet's Necessities, Ltd.*, 106 AD3d 577, 578 (1st Dept 2013).

A bench trial was held on August 28 and 29, 2013. The only witnesses that testified were Sontag and Schwartz.[3] At the conclusion of the trial, the parties were instructed to submit post-

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[2] The court's declaratory judgment on the expiration of the sublease was vacated, but such modification has no impact on the merits of this case and was not addressed at trial.

[3] Plaintiffs initially called an expert, Victor Menkin, to testify, but failed to provide defendants full expert disclosure prior to trial. The court allowed plaintiffs to conduct direct examination of the expert, but ordered expert disclosure to be made before defendants' cross-examination. Plaintiffs, however, withdrew their expert prior to cross-examination. *See* Tr. at 112. Thus, the expert's testimony (Tr. at 11-43) is stricken from the record.

trial briefs, which were filed on September 18, 2013. For the reasons that follow, the court finds that plaintiffs suffered no damages.

II. Findings of Fact

The court does not find Sontag's testimony to be credible. Sontag is a highly sophisticated businessman. He has extensive knowledge about finance and the due diligence that one performs before entering into a business transaction. Before he made the career transition into managing pet stores, Sontag worked for a number of firms on Wall Street, where he analyzed corporate financial statements. Tr. at 47-48. He had been in business since 1991 and had previously operated two pet stores in partnership with others. Based on this experience, Sontag testified that he would not enter into a partnership agreement, such as the agreement with defendants, without knowing what the rent was going to be. Tr. at 48. Indeed, he testified that when entering the partnership in 2001, he agreed to pay what the pet store had previously been paying (Tr. at 39-40) and that was what was paid. He did not ask to see the lease at that point, even though the sublease was signed in 2004 and he knew the over-lease was set to expire in 2003. This belies Sontag's contention that he was not fully aware of what the Partnership would be paying in rent.[4]

That being said, if Sontag testified truthfully – meaning that he did not know that CVC was making money on the Partnership's sublease – such testimony conclusively establishes that, as this court suspected (but could not rule as a matter of law) on the summary judgment motion, "he was not particularly concerned about the rent the Partnership would be paying to occupy the

[4] Sontag knew the amount of rent the Partnership would be paying because such amount was disclosed in a letter he received from defendants on March 4, 2001. Tr. at 41-44; Def. Ex. A (Tab L in defendants' exhibit binder).

Retail Space." Ergo, either (1) Sontag, a sophisticated businessman negotiating an arms-length deal, chose not to inquire about the rent the Partnership would be paying relative to CVC's rent because he did not care (if he cared, as a sophisticated businessman, he would have done his due diligence in accordance with his usual practices); or (2) Sontag knew what the rent was, but did not care that CVC was making a profit. The court is inclined to believe that the former is true given the fact that defendants' contribution to the partnership was the build-out of the space and all the supplies, the use of the basement for storage and the use of the vestibule. In either event, his claim for breach of fiduciary duty fails because, as explained in Part III, such a claim for self dealing is not viable where, as here, the plaintiff acquiesced or consented to the challenged transaction.

Moreover, though the court did not explicitly mention the 2003 Amendment in the quoted portion of the SJ Decision, the issue is the same. Before entering into the Partnership in 2001, Sontag reviewed the 1988 Lease, which was set to expire in 2003.[5] Tr. at 7; *see* Pl. Ex. 4 (Tab A in defendants' exhibit binder). Consequently, Sontag knew that the lease was to expire and had to be renegotiated, which is what occurred. The fact that Sontag failed to inquire about the extension (the 2003 Amendment), including any changes to the Partnership's rent prior to signing the sublease, further demonstrates that he did not care about the Partnership's rent. Additionally, since Sontag owns a majority of the Partnership's equity and controls its finances, he could have inquired into the rent at any time. The fact that he never did bolsters the notion that he never cared.

[5] Sontag testified that the parties had discussed partnering in 1997 and that he saw the 1988 lease then. The talks did not end in a partnership, and instead, Sontag moved his store to 91st Street from the 75th Street location near defendants.

Sontag raised the rent issue for the first time in this action – almost a decade after the Partnership was formed.[6] This dispute also is the subject of a dissolution proceeding before the court (Index No. 650102/2011). In an order dated July 16, 2012, issued on the same day as the SJ Decision, the court ordered the parties to arbitrate the disputes raised in that proceeding in accordance with Section 10 of the Partnership Agreement and stayed that proceeding pending the outcome of arbitration. The issues raised in the dissolution proceeding will ultimately determine the future of the Partnership. In contrast, this action and the issue of the Partnership's rent have no impact on the merits of the parties' dispute over the business. Rather, this action has served as an unfortunate distraction, diverting the parties' attention and resources away from the real issues which must be resolved so that the business can move forward.[7]

III. Conclusions of Law

"In a civil action such as this one, it is incumbent upon the Plaintiff to prove his entitlement to judgment by a fair preponderance of the credible, relevant, material and admissible evidence. It is the province and indeed, the obligation, of the trial court to assess and determine matters of credibility." *Parr v Ronkonkoma Realty Venture I LLC*, 18 Misc3d 1138(A), at *6 (Sup Ct, NY County 2008), citing *Wendy A. v John H.*, 65 NY2d 826 (1985); *Torem v 564 Cent. Ave. Rest., Inc.*, 133 AD2d 25 (1st Dept 1987).

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[6] This is not the first time that Sontag has had a falling-out with his pet store business partners. Shortly before going into business with defendants, Schwartz obtained a lucrative buyout to settle his despite with his former pet store partners. Tr. at 15-16.

[7] Though the court ordered the parties to arbitration more than a year ago – and did *not* stay the arbitration pending the outcome of this trial (which, again, has no impact on the merits of the arbitration other than to provide Sontag with settlement leverage) – it is not clear if the parties have even begun preparing for that arbitration.

At the outset, it should be noted that PEP's claim for breach of fiduciary duty is derivative, meaning that any recovery would go to the Partnership. *See Yudell v Gilbert*, 99 AD3d 108, 113-14 (1st Dept 2012). As a result, Sontag's real stake in this action is only 51% (PEP's equity in the Partnership) of the alleged improper overpayment of rent. Regardless, the claim fails.

It is well established that "a corporate fiduciary may not, without consent, divert and exploit for his own benefit any opportunity that should be deemed an asset of the corporation." *Commodities Research Unit (Holdings) Ltd. v Chemical Week Assocs.*, 174 AD2d 476, 477 (1st Dept 1991). However, where, as here, the plaintiff consented to the alleged improper diversion, the plaintiff cannot later maintain that such conduct was a breach of fiduciary duty. *Owen v Hamilton*, 44 AD3d 452, 455 (1st Dept 2007); *Miller Mfg. Co. v Zeiler*, 72 AD2d 338, 342 (1st Dept 1980); *see also* 4C NY Prac, Com Lit § 92:8 (3d ed) ("If the corporation learns that a business opportunity is being diverted by its agent, and either consents to or acquiesces in the agent's conduct, New York courts will not sustain a cause of action on the corporation's behalf.").

Sontag acquiesced to the terms of the Sublease and the profit made by CVC. Indeed, since PNL's capital contribution was the Retail Space itself, it is not out of the question that PNL sought to adjust the value of its contribution through the terms of the Sublease to more accurately reflect the relative value of the parties' contributions to the business. Nevertheless, there is no need to speculate why the Partnership's rent was the agreed upon amount because defendants' motivations are irrelevant. Rather, the only party's state of mind that is relevant is Sontag's – and he clearly did not care about the rent. Therefore, Sontag's acquiescence to the

terms of the Sublease demonstrates that neither he nor the Partnership were damaged. Thus, though making "a secret profit off a contract with the Partnership" is generally a breach of fiduciary duty, and, perhaps, defendants might have taken more steps to ensure that everyone was on the same page about the rent, in the end, no one was harmed. In fact, it appears that the rent paid was a negotiated term between businessmen before they entered into the partnership, without any consideration as to what defendants paid their over-landlord. The court does not believe defendants acted with any nefarious intent or ill will towards Sontag.

Finally, as no damages are awarded, the court will not make findings of fact related to the myriad legal issues surrounding the proper computation of damages, such as whether the statute of limitations only allows for damages since August 2007. Therefore, the court denies defendants' motion *in limine* (Seq. No. 004) because such issues are moot. Accordingly, it is

ORDERED that, on plaintiffs' claim for breach of fiduciary duty, the court finds that plaintiffs suffered no damages; and it is further

ORDERED that, within 14 days of the entry of this order on the NYSCEF system, Sontag must cause the Partnership to remit payment for all withheld rent, taxes, and utilities; and it is further

ORDERED that defendants' motion *in limine* (Seq. No. 004) is denied as moot; and it is further

ORDERED that, if they have not already done so, the parties must commence an arbitration proceeding in accordance with the court's July 16, 2012 order in the dissolution

proceeding (Index No. 650102/2011) within 45 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that the Clerk is directed to enter judgement dismissing the Complaint with prejudice.

Dated: December 30, 2013

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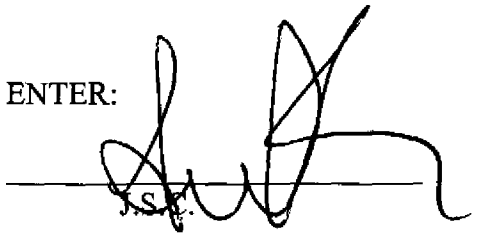

J.S.C.