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SJC-13049

JOSEPH R. MULLINS¹ vs. JOSEPH E. CORCORAN & another.²

Suffolk. March 5, 2021. - August 26, 2021.

Present: Budd, C.J., Lowy, Cypher, Wendlandt, & Georges, JJ.

Res Judicata. Collateral Estoppel. Judgment, Preclusive effect. Contract, Performance and breach. Fiduciary. Judicial Estoppel. Corporation, Close corporation, Stockholder's derivative suit. Practice, Civil, Judgment on the pleadings.

Civil action commenced in the Superior Court Department on July 11, 2017.

The case was heard by Brian A. Davis, J., on a motion for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Jonathan M. Albano for the plaintiff.
Andrew R. Levin for Gary A. Jennison.
Bruce E. Falby for Joseph E. Corcoran.

¹ Individually and derivatively on behalf of Cobble Hill Center LLC.

² Gary A. Jennison.

WENDLANDT, J. "If at first you don't succeed, try, try again."³ Not so in litigation. In this case, we apply the doctrine of issue preclusion to affirm a Superior Court judge's allowance of the defendants' motion for judgment on the pleadings on the ground that the claims were based on issues that had been litigated and decided in previous litigation between the same three parties. We also address the question whether the plaintiff, an owner of the closely held corporation at the center of the parties' long-standing dispute, is precluded from asserting these claims by means of a derivative action. We conclude that where, as here, the interests of the parties fully coincide with that of the closely held corporation, such a derivative action is precluded.

1. Background. We recite the facts "drawn from the parties' pleadings and the exhibits attached thereto." See Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 723 (2013).

a. Parties' course of dealings. The plaintiff, Joseph Mullins, and the defendants, Joseph Corcoran and Gary Jennison, share ownership of Corcoran, Mullins, Jennison, Inc. (CMJ), an entity engaged in real estate development. The parties have been in business together since the early 1970s, and by the mid-

³ T.H. Palmer, *The Teacher's Manual* 223 (1840).

1980s had developed and owned approximately twenty-five residential apartment projects. Corcoran owns a sixty percent interest in CMJ, while Jennison and the plaintiff each own a twenty percent share of the company.

In 1987, the plaintiff sought to create his own company, and the parties entered into a written contract (1987 agreement) governing the plaintiff's separation from certain businesses of CMJ, as well as the conduct of ongoing and future business between the three owners.⁴ The agreement stated that business dealings among the group would be "conducted in scrupulous good faith."

One of the projects governed by the 1987 agreement involved a parcel of land in Somerville that contained a 224-unit apartment building and a one-story building with retail space. In 2003, CMJ began to explore possibilities for redeveloping the property. CMJ decided to divide the property, with one portion containing the apartment building and another including the retail building (Cobble Hill Center site). A new entity, Cobble

⁴ Thereafter, the plaintiff created his own company, Joseph R. Mullins Company, and the defendants formed Cor-Jen, now known as Corcoran Jennison Company, Inc. (CJ). In 2001, the plaintiff commenced the first of a series of civil actions among the parties, see Mullins v. Corcoran, 65 Mass. App. Ct. 1122 (2006), which eventually led to the instant matter. Since the plaintiff's initiation of the first action in 2001, Corcoran has not spoken to him.

Hill Center LLC, was formed as a closely held corporation⁵ to manage the Cobble Hill Center site.⁶

In 2009, CMJ began to explore the feasibility of developing the Cobble Hill Center site, and, by January 2012, CMJ was working on plans to develop a 160- to 170-unit apartment building on the site; CMJ estimated that the development would cost approximately \$36.7 million. In July 2012, the plaintiff consented to the planned development. By October 2013, CMJ obtained the requisite approvals from the city of Somerville (city). In December 2013, the plaintiff received a package of documents explaining that the zoning approvals were in place, and the project was moving forward to the construction planning phase (December 2013 proposal). Thereafter, in January 2014, the plaintiff sent a letter to the defendants stating that he

⁵ "A close corporation is typified by a small number of shareholders, no ready market for the corporate stock, and substantial majority shareholder participation in the management, direction, and operations of the corporation." Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 726 n.12 (2013), citing Donahue v. Rodd Electrottype Co. of New England, 367 Mass. 578, 586 (1975).

⁶ Cobble Hill Center LLC was operated by CMJ, and was indirectly owned by Corcoran, Mullins, and Jennison. Specifically, Cobble Hill Center LLC had as its only member the Cobble Hill Trust. The sole beneficiary of the Cobble Hill Trust was CMJ Cobble Hill LLP. CMJ Cobble Hill LLP was a limited liability partnership between the plaintiff (twenty percent), Jennison (twenty percent), and Corcoran (sixty percent); it was managed by CMJ.

did not consent to the development. Over the next several months, CMJ moved forward with evicting the tenants from the retail building so that construction could begin.

b. 2014 action. In July 2014, the plaintiff filed a complaint against the defendants, alleging breach of the 1987 agreement and breach of their fiduciary duties stemming from, inter alia, the defendants' pursuit of the December 2013 proposal notwithstanding the plaintiff's withdrawal of his consent in January 2014 (2014 action). See Mullins v. Corcoran, 95 Mass. App. Ct. 1107 (2019), cert. denied, 140 S. Ct. 905 (2020); Mullins vs. Corcoran, Mass. Super. Ct., No. 1484CV02302 (Suffolk County June 19, 2018).⁷ The complaint sought injunctive relief and damages for the plaintiff's share of the expenses incurred in 2014 relative to the development effort, as well as his share of the lost rental income from the retail center that was closed in anticipation of development. The defendants counterclaimed that the plaintiff had committed a breach of the 1987 agreement, and his fiduciary duties, by withdrawing his

⁷ More particularly, the complaint alleged breaches of the 1987 agreement and breaches of the defendants' fiduciary duties by "(1) proceeding with the development of the Cobble Hill property according to the December 2013 [proposal] without consent of [the plaintiff]; (2) spending CMJ funds of other affiliates on such venture without consent of [the plaintiff]; (3) refusing to cease the unauthorized venture; [and] (4) refusing to meet with [the plaintiff] or otherwise conducting themselves in accordance with their fiduciary duties."

consent more than a year after he had approved the development, and after CMJ had received the necessary zoning approvals, and by interfering with the development efforts.

Discovery in the 2014 action ended in November 2015. Sixteen months later, in March 2017, the plaintiff sought to amend the complaint to add additional asserted breaches of the 1987 agreement and of the defendants' fiduciary duties, occurring after the complaint was filed, as well as to add derivative claims on behalf of Cobble Hill Center LLC. The defendants argued that the motion to amend should be denied as untimely, and a Superior Court judge agreed. Nonetheless, the parties were permitted to supplement their expert reports on damages to account for any changes due to the passage of time.

A jury-waived trial took place in May and June of 2018. Consistent with their earlier opposition to the plaintiff's motion to amend the complaint, the defendants filed several motions in limine seeking to exclude evidence regarding alternative development proposals by the plaintiff in 2016 and 2017.⁸ The judge denied the defendants' motion to exclude evidence of any proposals for the development and disposition of the property that the plaintiff had presented to the defendants

⁸ The defendants also sought to include additional evidence concerning their efforts to proceed with the December 2013 proposal after the complaint was filed in July 2014.

during the pendency of the 2014 action, including in 2016 and 2017. Accordingly, at trial, the plaintiff presented evidence regarding these alternative proposals for the development and disposition of the parcel as evidence of the defendants' failure to mitigate their losses.

Following the close of the evidence, the parties submitted proposed findings of fact and conclusions of law for the judge's consideration. The plaintiff specifically asked the judge to find that these alternative development proposals were feasible, that the defendants either ignored or inadequately considered them, and that, as a result, the defendants could not recover on their counterclaims.

The judge concluded that the plaintiff had failed to prove his claims and found in favor of the defendants on their counterclaims. The judge determined that the plaintiff had committed a breach of the 1987 agreement, as well as his fiduciary duties, by "trying to withdraw [his] consent [to the development detailed in the December 2013 proposal] in 2014 and by deliberately interfering with the efforts of CMJ to finance and construct the project," by "failing to promote the best interests of CMJ," and by "not acting in good faith." The judge also found that the defendants did not commit breaches of their

contractual or fiduciary duties by proceeding with the December 2013 proposal.⁹

Of the alternative proposals for the development or disposal of the parcel that the plaintiff presented to the defendants following the commencement of litigation, the judge determined that the plaintiff had shown only one to have been feasible; specifically, he concluded that the defendants could have mitigated their damages by pursuing a sale of the property in 2015 for \$15 million.¹⁰ Subtracting from the profits lost as a result of the plaintiff's breach both the costs that would have been incurred in the development and the mitigation value of the parcel itself, the judge awarded \$9 million to Corcoran (calculated based on his sixty percent interest) and \$3 million to Jennison (calculated based on his twenty percent interest) for their counterclaims.

⁹ At the same time, the judge determined that the defendants had committed a breach of their contractual obligation to provide the plaintiff with "all reports prepared for the management" of CMJ and material information on projects, by failing to inform the plaintiff of a particular offer to purchase the Cobble Hill Center site, but found that the failure was not material and did not result in harm to the plaintiff.

¹⁰ In particular, the judge credited an appraisal by Institutional Property Advisors (IPA) that the undeveloped land could have been sold for \$15 million in 2015, a time when the purchaser could have commenced construction on the December 2013 proposal because the requisite special permit and zoning variance were still in effect.

The plaintiff appealed, and the defendants cross-appealed with respect to the amount of damages. The Appeals Court affirmed the judgment, see Mullins, 95 Mass. App. Ct. 1107, and this court denied the plaintiff's application for further appellate review, see Mullins v. Corcoran, 482 Mass. 1106 (2019).

The Cobble Hill Center site lay undeveloped, fenced, and vacant during the pendency of these proceedings. The resulting deterioration and urban blight led the Somerville Redevelopment Authority (SRA) to effect a taking of the property in March 2019.¹¹

c. 2017 complaint. The plaintiff filed the complaint in the present case in July 2017, after his motion to amend the complaint in the 2014 action had been denied, but before the trial in that action. The complaint alleged that the defendants had engaged in "further misconduct beyond that alleged in [the 2014 action]." The complaint included claims for breaches of fiduciary duty and breaches of the 1987 agreement that occurred

¹¹ Cobble Hill Center LLC commenced an action in the Superior Court against the SRA, seeking a declaratory judgment that the taking was unlawful. After a Superior Court judge declined to issue the requested injunction, Cobble Hill Center LLC filed an appeal in the Appeals Court, and we transferred the case to this court on our own motion. Our decision upholding the action of the SRA issued on April 22, 2021. See Cobble Hill Ctr. LLC v. Somerville Redev. Auth., 487 Mass. 249 (2021).

after the 2014 action had commenced, and also asserted derivative claims on behalf of Cobble Hill Center LLC.

In August 2018, the defendants moved for judgment on the pleadings, pursuant to Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). Decision on the motion was stayed pending resolution of the 2014 action. In September 2019, a Superior Court judge, who was not the trial judge in the 2014 action, allowed the defendants' motion. The plaintiff appealed, and we transferred the matter to this court on our own motion.

2. Discussion. The plaintiff contends that the motion judge's allowance of the motion for judgment on the pleadings was error because the conduct at issue in this subsequent complaint occurred after the date in July of 2014 when the 2014 complaint was filed, his motion to amend the 2014 complaint to add these claims was denied, and the evidence of subsequent conduct that ultimately was introduced did not result in the issue being adequately litigated. He maintains as well that the prior action did not address damages incurred after 2016; the defendants are estopped from raising the issue of preclusion; fundamental fairness requires that his claims not be precluded; and none of the prior individual claims bars his derivative claims here.

a. Standard of review. A motion for judgment on the pleadings under Mass. R. Civ. P. 12 (c) is "actually a motion to

dismiss . . . [that] argues that the complaint fails to state a claim upon which relief can be granted." Jarosz v. Palmer, 436 Mass. 526, 529 (2002), quoting J.W. Smith & H.B. Zobel, Rules Practice § 12.16 (1974). We review the allowance of a motion for judgment on the pleadings de novo. See Merriam, 464 Mass. at 726, citing Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 600 (2010). In deciding the motion, all facts pleaded by the nonmoving party must be accepted as true. Jarosz, supra at 529-530. We also may rely on "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint" (citation omitted). Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). We "draw every reasonable inference in favor of . . . the nonmoving party . . . to determine whether there are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief" (quotations and citations omitted). UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 405 (2019).

b. Doctrine of issue preclusion. The key question before us is whether the motion judge erred in his determination that the plaintiff's claims were precluded because the issues upon which the claims rested had been previously decided in the 2014 action. "The doctrine of issue preclusion provides that when an issue has been 'actually litigated and determined by a valid and final judgment, and the determination is essential to the

judgment, the determination is conclusive in a subsequent action between the parties whether on the same or different claim.'" Jarosz, 436 Mass. at 530-531, quoting Cousineau v. Laramee, 388 Mass. 859, 863 n.4 (1983). See DeGiacomo v. Quincy, 476 Mass. 38, 42 (2016). The doctrine is intended "to conserve judicial resources, to prevent the unnecessary costs associated with multiple litigation, and to ensure the finality of judgments." Martin v. Ring, 401 Mass. 59, 61 (1987). The burden of demonstrating that an issue is precluded "is always on the person raising the bar." Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 373 (1985). See Taylor v. Sturgell, 553 U.S. 880, 907 (2008), quoting 18 C.A. Wright, A.R. Miller, & E.H. Cooper, *Federal Practice and Procedure* § 4405, at 83 (2d ed. 2002) ("a party asserting preclusion must carry the burden of establishing all necessary elements"); Mass. R. Civ. P. 8 (c), 365 Mass. 749 (1974) (res judicata is affirmative defense).

An issue has been "actually litigated" if it "was subject to an adversary presentation and consequent judgment that was not a product of the parties' consent" (quotations omitted). Jarosz, 436 Mass. at 531, quoting Keystone Shipping Co. v. New England Power Co., 109 F.3d 46, 52 (1st Cir. 1997). "When an issue is properly raised . . . and is submitted for determination, and is determined, the issue is actually

litigated" Restatement (Second) of Judgments § 27 comment d (1982).

The "requirement that the issue decided be 'essential to the judgment' requires that the issue be essential to the merits of the underlying case." Jarosz, 436 Mass. at 529. The issue must have had a "bearing on the outcome of the case," and not "merely [have been] essential to a determination of the narrow issue before the court at that time." Id. at 533. The nonmoving party previously must have had a full and fair opportunity to litigate the issue. See Alba v. Raytheon Co., 441 Mass. 836, 841 (2004). "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." K.G.M. Custom Homes, Inc. v. Prosky, 468 Mass. 247, 257 (2014), quoting Mass. R. Civ. P. 15 (b), 365 Mass. 761 (1974).

"A determination is considered final when 'the parties were fully heard, the judge's decision is supported by a reasoned opinion, and the earlier opinion was subject to review or was in fact reviewed.'" Jarosz, 436 Mass. at 533-534, quoting Tausevich v. Board of Appeals of Stoughton, 402 Mass. 146, 149 (1988).

c. Application. The plaintiff's individual allegations in the 2017 complaint center on the defendants' alleged "bad-faith

rejections and/or refusals to consider" the alternative development proposals that he brought to their attention during the pendency of the prior litigation;¹² a third count of the complaint, brought by the plaintiff as a member on behalf of Cobble Hill Center LLC, raises similar derivative claims.

i. Effect of motion to amend. The plaintiff maintains that the claims here are not precluded because his motion to amend the complaint in the 2014 action to add these asserted breaches, such as the failure to consider his alternative development proposals or to address periods of time after the filing of that action, was denied. Evidence concerning these events, however, was introduced at trial for purposes of establishing the plaintiff's mitigation of damages defense and was relied on by the plaintiff in his proposed findings, in which he specifically invited the trial judge to find that the defendants committed breaches of the 1987 agreement and their fiduciary duties by not adequately considering his alternative proposals to enhance revenue or to prevent impairing the value of the property. The trial judge declined to do so.

¹² The 2017 complaint also contains a number of specific claims that mirror claims asserted and rejected in the 2014 action, including alleged breaches due to the termination of the leases for the retail space and the associated loss of rental income, the failure to disclose a particular offer to purchase, and Corcoran's refusal to speak with the plaintiff. We agree with the motion judge that the plaintiff is precluded from pursuing these virtually identical allegations in this action.

With one exception -- a potential sale of the property in 2015 for \$15 million -- the trial judge concluded that the plaintiff had failed to show that the alternative developments he proposed were feasible, at least in the relevant time frame, because they all would have required zoning variances or changes in the zoning bylaw.¹³ Accordingly, because the plaintiff was unable to establish in the 2014 action that the proposed alternatives were feasible, he is precluded from now asserting that the defendants committed a breach of their obligations to him under the 1987 agreement, or their fiduciary duty of "utmost good faith and loyalty."¹⁴ Merriam, 464 Mass. at 726, quoting O'Brien v. Pearson, 449 Mass. 377, 383 (2007). In other words, the failure to act upon alternative development proposals, which were determined not to be feasible, constituted neither a breach of contract nor a breach of a fiduciary duty to act in good

¹³ The trial judge found that it would have been "highly unlikely that the zoning [bylaw would] be changed" by the city in a manner so as to permit construction of the second proposed apartment building on the site, as contemplated by many of the plaintiff's alternative proposals, "in the foreseeable future."

¹⁴ Likewise, the requirement of, and unlikelihood of obtaining, changes to the zoning bylaw was the reason the judge found that the defendants' one breach in failing to disclose a potential sale to the plaintiff was not material, see note 9, supra, as the undisclosed offer was conditioned on obtaining changes in or variances to the zoning bylaw.

faith and to take reasonable measures to avoid impairing the value of the property.

The plaintiff maintains that the 2014 action nonetheless should not be given preclusive effect because, if he were able to establish that the defendants committed a breach of their fiduciary duty to him in connection with their treatment of the alternative development proposals, the burden would shift to the defendants to show that there was no causal connection between their breach of duty and the plaintiff's damages. See Meehan v. Shaughnessy, 404 Mass. 419, 440-442 (1989) (placing burden on fiduciary to show absence of causal connection between breach and damages). By contrast, in the 2014 litigation, the plaintiff, who was determined to have committed a breach of the 1987 agreement on the defendants' counterclaims, bore the burden of establishing that the defendants failed to mitigate their damages through these alternative proposals. See Kiribati Seafood Co. v. Dechert LLP, 478 Mass. 111, 123-124 (2017), quoting American Mech. Corp. v. Union Mach. Co. of Lynn, 21 Mass. App. Ct. 97, 103 (1985) ("[T]he burden of proving that losses could have been avoided by reasonable effort rests with the party in breach").

As the plaintiff argues, "[t]he determination of an issue in a prior proceeding has no preclusive effect where '[t]he party against whom preclusion is sought had a significantly

heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action.'" See Jarosz, 436 Mass. at 532, quoting Restatement (Second) of Judgments § 28(4) (1982). However, the plaintiff's focus on the differing burdens of proof is misplaced. As discussed, it was the plaintiff's burden in the 2014 action to establish that the defendants failed to undertake reasonable efforts to mitigate their damages by considering feasible alternatives; this required the plaintiff to show that the alternatives he proposed were feasible. Similarly, to prevail on his claim in the 2017 complaint, the plaintiff would be required to show that the proposed alternatives were feasible in order to establish that the refusal to consider them constituted a breach. Having failed to show that the alternatives were feasible in the 2014 action, he is precluded from grounding his claims for breach on those same proposals.

ii. Post-October 2016 conduct. The trial judge in the 2014 action awarded damages to the defendants calculated based upon, inter alia, the value of the project as of October 2016, the date on which the December 2013 proposal was anticipated to have been completed but for the plaintiff's breach. The plaintiff contends that he is not precluded from pursuing claims

against the defendants for asserted breaches of the 1987 agreement and their fiduciary duty by failing to consider in good faith alternative development proposals that the plaintiff obtained and presented to them after October 2016.

The primary alternative proposals that the plaintiff identifies as subsequent to October 2016 are an analysis and report by Peter Quinn Architects (PQA report), and a plan developed by DPZ Partners (DPZ plan), both created in 2016. Each envisioned a more extensive development effort than had been defined in the December 2013 proposal, and involved multiple buildings and both parts of the divided Cobble Hill parcel. Both plans were considered during the trial in the 2014 action. Indeed, during the 2014 action, citing these plans, the plaintiff proposed that the judge make factual findings that he "presented several reasonable, good faith proposals" that had "either been ignored, inadequately considered, and/or rejected by [the defendants]." The proposed findings also stated that the defendants could not recover for any of their counterclaims because they had ignored the plaintiff's alternative development proposals.

The judge concluded, however, that the PQA report and DPZ plan would not have been feasible at that time. The judge found that both proposals "sketched out possible redevelopment of the combined Cobble Hill Apartments and Cobble Hill Center sites.

The projects, as sketched out, would have been far larger and far riskier than the Cobble Hill Center approved by the [c]ity in the fall of 2013," and "neither of those projects could be built under the existing [city] zoning ordinance." The judge concluded that there was "no reasonable prospect that CMJ could obtain rezoning that would allow projects of that scale on the combined Cobble Hill Apartments and Cobble Hill Center sites."¹⁵

In addition to the PQA report and DPZ plan, the plaintiff points to two other proposals that were made both before and after October 2016. First, the plaintiff proposed a presale transaction, whereby a sale of the property in the future to a third-party investor would be contracted before starting construction. The judge found such a transaction to be "completely speculative" and concluded that propounding it evinced the plaintiff's bad faith in withdrawing his consent to the December 2013 proposal. The judge observed, "If risks in the financial markets, the residential real estate market, and the economy, as a whole, made it far too risky to go forward

¹⁵ The 2017 complaint also alleges that the defendants did not consider the plaintiff's June 9, 2017 letter, in which he shared his evaluation of the value of the Cobble Hill Center based on the DPZ plan and PQA report and asserted that CMJ should "explore development options for the parcel and take action to preserve value for CMJ." This letter, as with the DPZ plan and PQA report on which it was based, was introduced at trial and similarly proposed plans of the scale that the judge found had "no reasonable prospect" of the projects coming to fruition.

with the project, as [the plaintiff] had asserted just one month earlier, then no third-party investor would be willing to agree to such a presale transaction on terms that would allow CMJ to share in any meaningful part of profits if the project were built and commercially successful."

Second, the plaintiff proposed that CMJ enter into a joint venture with an equity partner. The plaintiff's proposed findings of fact stated that the possibility of obtaining a joint venture equity partner was a reasonable good faith proposal that the defendants had ignored. The judge declined the invitation to make such findings. See Mass. R. Civ. P. 15 (b) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings").

In sum, because the issues underlying the post-2016 alternate proposals were fully litigated and decided, the findings are preclusive on those issues. Because the alternate projects were deemed infeasible, the plaintiff is precluded from arguing here that the defendants' failure to consider these proposals was a breach of the 1987 agreement and their fiduciary duties.¹⁶

¹⁶ In addition to damages for breaches of contract and breaches of fiduciary duty, the plaintiff seeks injunctive relief. He asserts that, "[u]nless Corcoran's and Jennison's breaches of [their] fiduciary duties are enjoined, [he] will

iii. Judicial estoppel and fundamental fairness. The plaintiff contends that the defendants are judicially estopped from arguing that the claims in the 2017 complaint are subject to preclusion, because the defendants successfully opposed his motion to amend the complaint in the 2014 action to add the instant claims. "Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding." Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 639-640 (2005), quoting Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998). The doctrine of judicial estoppel seeks "to prevent the manipulation of the judicial process by litigants." Commonwealth v. DiBenedetto, 458 Mass. 657, 671 (2011), quoting Canavan's Case, 432 Mass. 304, 308 (2000). For judicial estoppel to apply, "the position being asserted in the litigation must be 'directly inconsistent,' meaning 'mutually exclusive' of, the position asserted in a prior proceeding," and "the party must have succeeded in convincing the court to accept its prior position" (citation omitted). Otis, supra at 640-641.

suffer irreparable harm." Injunctive relief is a remedy, and not a cause of action. See Woods v. Wells Fargo Bank, N.A., 733 F.3d 349, 353 n.3 (1st Cir. 2013). Accordingly, because the plaintiff's underlying claims for breach were precluded, his request for injunctive relief also is precluded. See id.

Here, while the defendants succeeded in opposing the plaintiff's motion to amend the 2014 complaint, the trial judge denied the defendants' efforts to exclude evidence of these proposals that the plaintiff sought to introduce to show the defendants had failed to mitigate their damages, and the plaintiff then was able to introduce evidence concerning these events. As set forth supra, that evidence was introduced substantively and relied upon by the parties and the trial judge. Thus, the defendants did not succeed in their efforts to exclude this evidence, and judicial estoppel does not apply.

Principles of fundamental fairness similarly do not provide a basis to avoid issue preclusion here. See Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 11 (1995) (before collateral estoppel may be used offensively, fact finder must determine whether doing so would be fair). Even where an issue meets the requirements for preclusion, fundamental fairness mandates that preclusion not be applied where there was a lack of "an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments § 28(5) (1982). Here, the plaintiff had the opportunity and incentive to litigate the issue whether the alternative proposed developments were feasible and considered by the defendants in good faith.

Significantly, the trial judge found that the plaintiff commenced the 2014 action in bad faith, specifically with the intent of preventing development of the 2013 proposal. The judge found:

"In July of 2014, [the plaintiff] filed this lawsuit against [the defendants] to stop them from going forward with the Cobble Hill Center project. [The plaintiff] knew when he did so that no one would finance the project so long as one principal is suing the other two.

". . .

"I find the same was true in July of 2014, that [the plaintiff] intended, by filing suit, to stop the Cobble Hill Center project from going forward and that he succeeded in doing that.

". . .

"I find that if [the plaintiff] had not tried to withdraw his consent to the project and had not then brought a lawsuit to stop the project, that, in fact, CMJ would have been able to construct the new Cobble Hill Center apartment building as approved by the [c]ity, and I find that CMJ would have been able to stabilize it, achieving at least [ninety-five] percent residential occupancy, by October of 2016."

In these circumstances, there is no unfairness in the determination that the issues the plaintiff raised in the 2017 complaint are subject to preclusion.

iv. Derivative claims. The 2017 complaint also asserts a claim for breaches of fiduciary duty derivatively on behalf of Cobble Hill Center LLC: the defendants' (1) pressing forward with the development project described in the December 2013 proposal that was not in the best interests of Cobble Hill

Center LLC, and limited the potential value of the property;
(2) terminating leases and evicting retail tenants, thereby
ending by August 2014 a source of revenue for Cobble Hill Center
LLC; and (3) refusing or failing to consider a number of
development proposals that "would result in substantially higher
returns to Cobble Hill Center LLC than the returns projected in
[the] defendants' December 2013 [p]roposal."¹⁷

"A party is precluded from relitigating an issue
where . . . the party against whom preclusion is asserted was a
party (or in privity with a party) to the prior adjudication"
(quotation and citation omitted). DeGiacomo, 476 Mass. at 42.
At the same time, "[i]t is a violation of due process for a
judgment to be binding on a litigant who was not a party or a
privy and therefore has never had an opportunity to be heard."
Id. at 44, quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322,
327 n.7 (1979). The requirement of the identity of parties or
privity for the purposes of issue preclusion derives from the
principle that "a person who was not a party to a suit generally
has not had a 'full and fair opportunity to litigate' the claims
and issues settled in that suit. The application of claim and

¹⁷ The proposals included those set forth in the plaintiff's
presale proposals, an "as built" proposal (one of three possible
scenarios suggested by IPA for handling the Cobble Hill Center
site), a number of alternatives for the sale of the undeveloped
land, the PQA report, and the DPZ plan.

issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court'" (citation omitted). Taylor, 553 U.S. at 892-893.

Because "[a] corporation is for most purposes treated as a jurial person distinct from its stockholders, members, directors, and officers," Restatement of Judgments (Second) § 59 comment a (1982), in a direct action by a shareholder and a derivative action, the parties generally are not the same. Therefore, a judgment in an action involving a party who is an officer, director, stockholder, or member of a nonstock corporation ordinarily will not have preclusive effect on the corporation itself. See id. Ensuring shareholders are not precluded from bringing derivative suits is important as "[a] derivative suit involves a right of action of the corporation that is enforced by the stockholders because the corporation's management has failed to enforce the right." Id. at § 59 comment c.

In the case of a closely held corporation, however, the interests of a stockholder, on the one hand, and of the closely held corporation, on the other, may be so similar as to warrant preclusion. See Spickler v. Dube, 644 A.2d 465, 468 (Me. 1994) ("When a corporation is closely held, the interests of the corporation, its management and shareholders generally fully coincide . . . [such that] the judgment in the shareholder's action is conclusive on the corporation except when relitigation

is necessary to protect the interest of another owner or a creditor of the corporation"). As the Restatement (Second) of Judgments § 59 comment e (1982) explains,

"For the purpose of affording opportunity for a day in court on issues contested in litigation, . . . there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct. On the contrary, it may be presumed that their interests coincide and that one opportunity to litigate issues that concern them in common should sufficiently protect both."

See, e.g., In re Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983) (where debtor owned all shares of corporation and exercised day to day control, privity between debtor and corporation existed such that he was precluded from raising issue of corporate indebtedness, previously litigated in government suit against corporation, at his later trial for personal bankruptcy); Fink v. Magner, 988 F. Supp. 74, 79 (D. Conn. 1997) (plaintiff, one of two shareholders of corporation, was precluded from relitigating as individual issues what had been litigated in prior suit brought by corporation, in which plaintiff actively participated).

The interests of the corporation, management, and shareholders of a closely held corporation "generally fully coincide." See Restatement (Second) of Judgments § 59 comment e (1982). "[O]wnership and management are in the same hands," and "the owners are quite dependent on one another for the success of the enterprise. Many close[ly held] corporations are really

partnerships between two or three people who contribute their capital, skills, experience and labor" (quotation and citation omitted). Donahue v. Rodd Electrotpe Co. of New England, 367 Mass. 578, 587 (1975). Moreover, the "public policies underlying the doctrine of collateral estoppel, as a bar to repetitious litigation, would support a finding of privity between a close corporation and its sole or controlling stockholder" (quotation and citation omitted). In re Gottheiner, 703 F.2d at 1140.

Cobble Hill Center LLC is comprised of three owners: the plaintiff and the defendants.¹⁸ There is no other owner or creditor whose interest was unrepresented in the 2014 action. See Aetna Cas. & Sur. Co. v. Kerr-McGee Chem. Corp., 875 F.2d 1252, 1259 (7th Cir. 1989) ("if estoppel is asserted against the corporation based on prior litigation by a shareholder, preclusion is only denied where the interests of third parties would be unfairly concluded by barring relitigation"); Restatement (Second) of Judgments § 53(b) (1982). Accordingly, the interests of Cobble Hill Center LLC were adequately represented in the 2014 action, and the plaintiff may be bound by that action. Contrast Massachusetts Prop. Ins. Underwriting Ass'n v. Norrington, 395 Mass. 751, 754-755 (1985) (criminal

¹⁸ See note 6, supra.

conviction for killing did not preclude beneficiary of victim's estate from litigating issue of wrongful death in subsequent civil suit because interests of beneficiary were not represented in prior criminal case).

Given this determination of privity, it is clear that the issues the plaintiff seeks to raise derivatively also are precluded.

Judgment affirmed.