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

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RALPH J. CUMMINGS,

Plaintiff,

-against-

ALIKI ENTERPRISES, INC., JACQUELINE THANASOULIS and STEVEN THANASOULIS,

Defendants.

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Decision/Order
Index No.: 113854/04
Seq. No. : 001

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 motion [dismiss] w/JFC affirm in support, exhs	1
Pltf's x-motion w/CTO affirm in support, affid in support (RC), exhs	2
Defs affirm in oppos and in reply (JFC)	3

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

This is an action by plaintiff Ralph J. Cummings ("Cummings") for the dissolution of corporate defendant, Aliki Enterprises Inc. ("Aliki" or "corporation"). Cummings was a chef at "Ivy's Bistro," a restaurant owned by Aliki. Jacqueline Thanasoulis is the president of Aliki and a shareholder. Steven Thanasoulis is also a shareholder. Mr. Thanasoulis manages the restaurant.

Presently, before the court is the defendants' motion to dismiss the complaint based upon CPLR § 3211 (a) (7). Issue, however, has already been joined, since defendants have served an answer to the complaint. Therefore, this is more properly a motion for summary judgment dismissing the complaint (CPLR § 3212). In any event, the result, whether under §§ 3211 or 3212, remains the same. On a motion to dismiss, the court views the complaint

and giving the plaintiff, every favorable inference, determines whether a cause of action is stated Guggenheimer v. Ginzburg, 43 NY2d 268 (1977); Rovello v. Orofino Realty Co., 40 NY2d 633 (1976). Granting summary judgment, on the other hand, is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Roluba Extruders v. Ceppos, 46 NY2d 223 (1977). When the existence of an issue of fact is even debatable, summary judgment should be denied. Stone v. Goodson, 8 NY2d 167 (1960). The proponent seeking summary bears the initial burden of proving its entitlement to summary judgment as a matter of law. Only if the movant meets its initial burden, will it then shift to the party who is opposed (e.g. here, the plaintiff) who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980).

Where, as here, the party opposed to the motion cross moves to compel discovery, the court must further consider whether facts essential to justify opposition may exist, but cannot then be stated. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004). In those circumstances, the motion for summary judgment should be denied, and the cross motion for discovery granted.

Background

Plaintiff worked at the restaurant as a chef. He first started working there in 1993. In 2001, plaintiff, both individual defendants, and the corporate defendant (by Mrs. Thanasoulis, as President) entered into a written stock transfer agreement dated November 20, 2001. They agreed to transfer 15% of the Aliki stock to plaintiff. In relevant portion, the agreement contains the following recitation:

> "**WHEREAS**, the TRANSFEREE has been employed by the CORPORATION as a chef for several years; and

> **WHEREAS**, the TRANSFEROR has been very satisfied with the professional services that the TRANSFEREE has rendered to the CORPORATION in his capacity as a chef and now wishes to TRANSFEREE to continue to render such services to the CORPORATION . . .

The agreement (¶ 1) further provides that the:

> "TRANSFEREE shall be a 15% stockholder of the CORPORATION. The transfer of the Shares is made as a gift in appreciation of the services previously rendered by the TRANSFEREE to the CORPORATION and for the TRANSFEREE's decision to continue his employment with the CORPORATION."

The agreement (¶ 4) provides that the shares are subject to forfeiture:

> "In the event that the TRANSFEREE acts in a manner that is in any way detrimental to the business of the CORPORATION, or if he engages in any conduct that is adverse to the interests of the CORPORATION (including, without limitation, any conduct that detracts from the TRANSFEREE's ability to fully and faithfully perform his duties as chef) or if he is frequently absent without valid excuse, resulting in harm to the business of the CORPORATION, the TRANSFEREE shall forfeit the Shares to the TRANSFEROR without any consideration therefor."

The agreement also provides (¶ 6) for plaintiff to continue his employment, and receive a salary:

> "In the event that the TRANSFEREE wishes to discontinue his employment with the CORPORATION, he shall be required to procure a successor employee (the "Successor Employee") at his own expense. In the event that the TRANSFEREE successfully procures a Successor Employee, the TRANSFEREE shall continue to own the Shares and shall continue to share in the net profits of the CORPORATION on a *pro rata* (i.e fifteen percent (15%)) basis. The Successor Employee shall, upon commencement of his or her employment with the CORPORATION, receive the salary received by the TRANSFEREE at the time of his termination, and the TRANSFEREE shall receive no further salary or compensation from the CORPORATION."

Plaintiff seeks money damages in this action. He claims that he was wrongfully terminated from his position as chef ("without cause"). He claims that he has not been paid any wages or his share of the profits since 2004. Plaintiff seeks the involuntary dissolution of Aliki because the defendants are not only looting the corporation, but they are not paying his share of the dividends, etc. Plaintiff contends that he received health insurance as a perquisite of his employment, as per an agreement he had with Mr. Thanasoulis. He claims it was wrongfully terminated without any notice.

Discussion

Defendants concede they have not complied with court ordered discovery. As per their so-ordered agreement dated October 27, 2005, the parties agreed to a schedule for depositions, and that defendants would provide supplemental responses to certain discovery demands. Defendants did not comply, but brought this motion instead. Since a motion for summary judgment stays discovery, plaintiff has been significantly hamstrung in further developing his case.

The reasons defendants provide for why they are entitled to dismissal of the complaint, and this case does not have to go to trial, are entirely unpersuasive. The complaint on its face state viable causes of action. The agreement is not documentary evidence that precludes plaintiffs claim. Indeed, at first blush, it supports some of his claims.

There are a number of factual disputes that would lead the court to deny their motion, even if it had been properly brought for summary judgment. First, there is a dispute whether plaintiff was terminated, as he claims, or voluntarily left his job, as defendants contend. There is also a dispute whether Mr. Thanasoulis promised plaintiff health insurance coverage, as plaintiff claims. Though defendants dismiss this factual claim as being out of

whole cloth, matters of credibility are not determined on a dispositive motion.

Defendants further contend that plaintiff is only a minority shareholder, and he cannot seek a corporate dissolution. The broad rule is that a shareholder seeking involuntary dissolution must hold at least 20% of the company's stock." BCL §1104-a; Shea v. Hambros PLC, 244 AD2d 39 (1st dept. 1998). However, there is an exception for situations where a minority shareholder in a closely held corporation is alleging "oppressive action" by the majority shareholders towards him. O'Neill v. Malloy Air East, Inc., 214 AD2d 736 (2nd dept. 1995); Matter of Kemp & Beatley, Inc., 64 NY2d 63 (1984). The failure to pay a minority shareholder a salary or dividends, or preventing him from participating as an employee may be considered "oppressive action." O'Neill v. Malloy Air East, Inc., *supra*. Therefore, defendants' legal arguments, that plaintiff has no standing to seek dissolution, are incorrect, as a matter of law. It is up to plaintiff to show, at a later time, that liquidation of the corporation is the "only feasible means" to protect his rights. Matter of Kemp & Beatley, Inc., *supra* at 73.

There are also other factual disputes framed by these papers, including whether defendants complied with COBRA and its notice requirements. Plaintiff contends his health benefits were ended without any notice to him.

For each and every reason provided above, defendants' motion to dismiss the complaint (whether styled as a summary judgment motion or otherwise) is denied in its entirety. Plaintiff's cross motion for enforcement of discovery is granted as follows:

The court will extend defendants' time to provide supplemental response to the items identified in the stipulation so-ordered by the court on October 27, 2005. These responses are to be delivered to plaintiff so as to be in hand or before **March 31, 2006.** Since plaintiff's

deposition was to precede defendants, but it was not held, plaintiff shall be deposed **no later than April 14, 2006.** Defendants' shall appear for their depositions **no later than May 1, 2006 at 10:00 a.m.** at plaintiff's attorney's office. These dates may only be modified by written stipulation submitted to the court for so-ordering.

Should defendants fail to provide responses to the documentary demands identified in the October 27, 2005 so-ordered stipulation, incorporated herewith by reference, issues to which the information pertains shall be deemed resolved for purposes of the action in accordance with plaintiff's claims without the need for any further order from this court. CPLR § 3126 (1).

A compliance conference is hereby scheduled for **May 11, 2006 at 9:30 a.m.** in Part 10, 80 Centre Street, Room 122.

Conclusion

Defendants' motion is denied in all respects. Plaintiff's cross motion is granted to the extent provided.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 20, 2006

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.