Vaccari v Vaccari
2018 NY Slip Op 30546(U)
March 28, 2018
Supreme Court, New York County
Docket Number: 656347/2017
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN PART 3
Justice

X

RICHARD VACCARI, PETER VACCARI

Plaintiff,

INDEX NO. 656347/2017

MOTION DATE

MOTION SEQ. NO. 001

- V -

PAUL VACCARI, AMETAL REALTY CORP.,

Defendant.

DECISION AND ORDER

X

The following e-filed documents, listed by NYSCEF document number 5, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this application to/for Dissolution/Preliminary Injunction and Cross-Motion to Dismiss

Upon the foregoing documents, it is

ORDERED: The Petitioners' motion for dissolution and preliminary injunction is DENIED and the Respondents' cross-motion to dismiss is GRANTED for the following reasons:

A. Petitioners Motion for a Preliminary Injunction and Corporate Dissolution along with Respondents' Cross Motion to Dismiss the Cause of Action for Corporate Dissolution.

I. With Regard to the Preliminary Injunction

Petitioners move to enjoin Respondent Paul Vaccari from transacting unauthorized business, exercising corporate powers except those necessary for the course of conducting regular business activities, making or collecting any payments from the corporation, transferring funds to the corporation, and using funds or assets of the corporation to pay personal or legal expenses.

In order to obtain a preliminary injunction, the Petitioners must show "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of equities in their favor." *See Aetna Ins. Co. v. Capasso,* 75 N.Y.2d 869, 862 (1990).

To establish a likelihood of success on the merits, the Petitioners need merely make a "prima facie showing of a reasonable probability" that it will be successful. *See Barbes Rest. Inc. v. ASRR Suzer 218, LLC.*, 140 A.D.3d 430, 431 (1st Dep't, 2016). Petitioners allege they have been denied access to the books and records of Defendant Ametal Realty, that a non-party, Piccinini Bros., has been using valuable commercial lease space rent free, and that the Respondents are allowing the property at issue to fall into disrepair.

The Petitioners demanded books and records access. *See Paul Vaccari Aff. Ex 11.* Access to books and records, however, is subject to denial by the corporation if the Petitioners "refused to furnish an affidavit that the inspection is not desired for purposes other than the business of the corporation, and that the Petitioner has not been involved in the sale of stock lists within the

last five years." *See Matter of Crane Co. v. Anaconda*, 39 N.Y.2d 14, 19 (1976). Petitioners demand was refused for failure to furnish an affidavit pursuant to BCL 624(c). *See id.* Petitioner has, therefore, failed to make a *prima facie* showing of success for books and records access.

Nevertheless, Respondent Paul Vaccari, admits that non-party, Piccinini Bros., owed substantial rental arrears to Ametal Realty, and that he has been attempting to obtain a mortgage on Ametal's building in order to conduct necessary repairs. *See Paul Vaccari Aff.* ¶¶*32-33.* As a result of this admission, the Petitioners have shown a reasonable probability of success on merits for their claims that Piccinini Bros. has been using valuable commercial lease space rent free, and that the Respondents have allowed the property to fall into disrepair.

These claims, however, seek the ultimate dissolution of the corporation and distribution and sale of the corporate assets to the shareholders. It is well settled that a claim for money damages, alone, does not constitute the type of irreparable harm warranting a preliminary injunction. *See JSC VTB Bank, ETC. v. Mavlyanov*, 154 A.D.3d 560, 561 (1st Dep't, 2017) (noting that a Plaintiff who can be fully compensated by money damages would not suffer irreparable harm). The value of the corporation, the amount of rental arrears owed to Ametal, and even the value of the building with or without repair, are all quantifiable numbers which can properly be remedied by monetary damages. Thus, the Petitioners fail to demonstrate the type of irreparable harm which warrants the drastic remedy of a preliminary injunction. *See id.*

In determining whether a preliminary injunction is warranted, this court must also balance the equities between the parties. *See Aetna Ins. Co.*, 75 N.Y.2d at 862. Here, the Petitioners hold a 25% interest in Ametal compared to Respondent, Paul Vaccari's 75% interest. As the controlling shareholder, Respondent Vaccari, hired an accounting firm first in 2014, and

then a new accounting firm in 2016, specifically to address and redress the opaque handling of business assets by the former President. *See Paul Vaccari Aff.* ¶¶*27-29.* The accountant assisted in establishing a payment schedule whereby non-party Piccinini Bros., would pay outstanding rental arrears, with interest. *See Monteferante Aff.* ¶¶*8-9.* Respondent Vaccari has also been making a good faith attempt to secure financing in order to conduct necessary repairs on the building which has been frustrated by the Petitioners' refusal to sign the mortgage documents. *See Paul Vaccari Aff.* ¶¶*32-33.*

This directly counters the Petitioners argument that the Plaintiff has been wasteful and neglectful of the building. Coupled with the notion that a Court should "exercise restraint and defer to good faith decisions" made by, in this case, the majority shareholder, the Court finds that the equities favor the Respondents. *See Lorne v. 50 Madison Ave, LLC*, 65 A.D.3d 879, 880 (1st Dep't, 2009). The Petitioners have, therefore, failed to demonstrate the requisite elements needed to establish their right to a preliminary injunction.

As a result, the Petitioners' motion for a Preliminary Injunction is DENIED.

II. With Regard to the Corporate Dissolution and Cross-Motion to Dismiss

Petitioners also move for the dissolution of Ametal Realty and the appointment of a Receiver pursuant to BCL §1104-a. Shareholders of 20% or more voting shares in a corporation not listed on the national exchange may petition to dissolve the corporation where: "(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions towards the complaining shareholders; and (2) the property or assets of the corporation have been looted, wasted, or diverted for non-corporate purposes by its directors,

officers, and those in control of the corporation." *See BCL § 1104-a(a).* Petitioners allege that the failure to provide business records, coupled with the lack in transparency of Respondent Paul Vaccari's business decisions, leads them to believe the Respondents are not acting in the minority shareholders' interests. *See e.g. Pet. ¶¶36-42.*

The Court, in determining whether to proceed with the involuntary dissolution, must take into account: "(1) whether the liquidation of the corporation is the only feasible means whereby the Petitioners may reasonably expect to receive a fair return on their investment; and (2) whether the liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the Petitioners." *See BCL §1104-a(b).*

The Respondents filed a cross-motion to dismiss the Petitioner's cause of action for corporate dissolution under CPLR 3211(a)(7). Petitioners first argue that filing a CPLR 3211(a)(7) motion concurrently with the answer is improper and that the Respondents have waived their right to bring a CPLR 3211(a)(7) motion. Petitioners' argument is flawed, however, given that CPLR 3211(e) expressly states that "any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of [CPLR 3211](a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of [CPLR3211](a) may be made at any subsequent time or in a later pleading". *See CPLR 3211(e).* Therefore, this court finds that the Respondents' decision to file a motion pursuant to CPLR 3211(a)(7) concurrently with their Answer is proper.

The standard on a CPLR 3211(a)(7) motion is to afford the pleading a liberal construction, accepting all the facts alleged in the Complaint as true, and according the plaintiffs

the benefit of every possible favorable inference in order to determine whether the facts as alleged fit "within any cognizable legal theory." *See Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). It is well settled, however, that allegations "consisting of bare legal conclusions" which are unsupported by underlying facts, and "factual claims which are flatly contradicted by documentary evidence" need not be considered true. *See Myers v. Schneiderman*, 30 N.Y.3d 1, 11 *reargument denied*, 30 N.Y.3d 1009 (2017).

The basis for the Petitioners' claim for corporate dissolution pursuant to BCL §1104-a is the Respondent's alleged minority shareholder oppression of the Petitioner's shares. *See BCL §1104-a(a)(2); see also Ferolito v. Vultaggio*, 99 A.D.3d 19, 25 (1st Dep't, 2012) *citing Fedele v. Seybert*, 250 A.D.2s 519, 521-22 (1st Dept, 1998). Determining whether a shareholder has been oppressed requires a determination as to the shareholder's "reasonable expectations . . . in the enterprise". *See Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 73 (1984) (holding that majority conduct should not be deemed oppressive simply because a Petitioner's subjective hopes and desires are not fulfilled).

Petitioners first allege that the Respondents' refusal to grant books and records access constitutes minority shareholder oppression. This allegation fails to state a cause of action given that the Petitioners have admitted to receiving certain books and records in the Petition itself and that denial of books and records access is permissible where the requesting party fails to supply the corporation with the required affidavits. *See Pet. ¶41; see also Matter of Crane Co. v. Anaconda*, 39 N.Y.2d 14, 19 (1976). Failure to grant access to books and records does not, alone, constitute the type of shareholder oppression warranting corporate dissolution. *See Orloff v. Weinstein Enters.*, 247 A.D.2d 63, 67 (1st Dep't, 1998).

Petitioners next allege that the Respondents failure to inform them of business decisions made in the ordinary course of business constitutes minority shareholder oppression. *Pet. ¶¶ 20, 23, 31, 32.* Relatedly, Petitioners' final stated ground for minority shareholder oppression is Respondent Vaccari's making of unilateral decisions which ultimately affect the corporation. While a majority shareholder has a "fiduciary obligation to treat all shareholders fairly and equally, to preserve corporate assets, and to fulfill their responsibilities of corporate management with scrupulous good faith", absent an agreement, or directive, to include the minority shareholders in corporate decisions, the ultimate "decision-making power respecting corporate policy will be reposed in the holders of a majority interest in the corporation." *See Kemp and Beatley,* 64 N.Y.2d at 69, 72. Thus, the failure to include the minority shareholders in decisions made during the ordinary course of business, and Respondent Vaccari's unilateral decisions which affect the corporation, do not give rise to a cause of action for minority shareholder oppression.

Petitioners' motion for corporate dissolution is therefore DENIED and the Respondents' cross motion to dismiss the cause of action for corporate dissolution is GRANTED.

B. Respondents' Cross Motion to Dismiss the Remaining Causes of Action

Petitioners' remaining causes of action seek an Accounting (Count 2); Breach of Fiduciary Duty (Count 3); Unjust Enrichment (Count 4); Conversion and Misappropriation (Count 5); and Attorney's Fees (Count 6).

I. Direct versus Derivative Claims

Petitioners make these claims both individually and on behalf of Respondent Ametal Realty Corp. It is well established that "an individual shareholder has no right to bring an action in his own name and on behalf [of the individual], for a wrong committed against the corporation." *General Motors Acceptance Corp. v. Kalkstein*, 101 A.D.2d 102, 105-06 (1st Dep't, 1984). To determine whether the Petitioners may bring their claims individually as well as derivatively, the Court must consider: (1) whether the corporation or the stockholders, in their individual capacity, suffered the alleged harm; and (2) whether the corporation or the stockholders, in their individual capacity, would receive the benefit of any recovery or other remedy. *See Serino v. Lipper*, 123 A.D.3d 34, 40 (1st Dep't, 2012) *citing Yudell v. Gilbert*, 99 A.D.3d 108 (1st Dep't, 2012). If a harm is "confused with, or embedded in the corporation, then it cannot separately stand." *See id.*

Here, the Petitioners' remaining causes of action are solidly entrenched within any harm and resulting damage to Ametal Realty Corp. *See Pet. ¶¶ 48, 49, 55, 57, 60, 61, 65, and 69.* The Petitioners' remaining causes of action are, therefore, derivative in nature and the Petitioners' individual claims are dismissed.

II. Petitioners' Derivative Cause of Action for an Accounting[1]

Petitioners claim that the fiduciary relationship between themselves and Respondent Vaccari existed. *Pet. ¶48.* As a result of an alleged breach of fiduciary duty, the Petitioners orally

[1] The Court, having reconsidered the grounds for dismissal stated on the January 29, 2018 record and transcript, clarifies and expands upon its earlier decision to dismiss this cause of action.

requested an accounting of the corporation and were denied. *Id. at ¶50.* Petitioners allege they are entitled to such an accounting. *Id at ¶51 and 52.*

Initially, the cause of action for an accounting is wholly conclusory with no indication as to what the purported breach of fiduciary duty was. *See Myers v. Schneiderman*, 30 N.Y.3d 1, 11 *reargument denied*, 30 N.Y.3d 1009 (2017). Insofar as the alleged breaches were that the Petitioners were "denied opportunities to understand the financial health of the company, to participate in the decision making of the company, and to safeguard it's well-being based on this information" the Petitioners have not stated a proper claim for breach of fiduciary duty against the Respondents. *See id., see also supra §2* (holding that these are not duties owed by Respondent Vaccari to the Petitioners).

Insofar as Ametal's duty to provide an accounting to its shareholders is concerned, it is black letter law that a corporation does not owe fiduciary duties to its members or shareholders. *See Stalker v. Stewart Tenants Corp.*, 93 A.D.3d 550, 552 (1st Dep't, 2012). Absent a fiduciary relationship between the Petitioners and Ametal, the Petitioners cannot state a claim for an accounting against Ametal. *See Zyskind v FaceCake Mktg. Tech, Inc.*, 110 A.D.3d 444, 447 (1st Dep't, 2013).

Petitioners also argue that Respondent Vaccari owes an individual fiduciary duty to Petitioner Richard Vaccari, arising from the terms of a New Jersey settlement agreement, as further basis for their claims for an accounting. *See Pet. ¶¶24-25.* This settlement agreement, however, merely grants Richard Vaccari the right to have reported to him the yearly revenue and expenses. *See Paul Vaccari Aff. Ex. 5 ¶14; see also Pet. ¶41* (noting that the respondents have received records which show minimal profits and mainly losses). This settlement does not grant

Petitioner Richard Vaccari any rights in excess of those granted under New York law. *Compare Paul Vaccari Aff. Ex. 5, ¶14* (granting Richard Vaccari the right to receive annual reports regarding revenue and expenses, and requiring Rudy and Paul Vaccari to not take any action which would devalue Ametal stock) *with Zyskind*, 110 A.D.3d at 447 (noting that access to books and records and profit and loss statements does not grant a right to a full accounting). Thus, the claim for an accounting is DISMISSED.

III. Petitioners' Derivative Cause of Action for Breach of Fiduciary Duty[2]

To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct. *See Castellotti v. Free*, 138 A.D.3d 198, 209 (1st Dep't 2016). Petitioners allege that Paul Vaccari, as majority shareholder, owed duties of care, disclosure, and loyalty to the Petitioner shareholders. *See Pet. ¶55.* Respondent Vaccari is alleged to "have breached each of these duties by engaging in the wrongful and oppressive conduct set forth herein and by causing the Company to lose the income to which it is entitled, and for leaving the building, a major asset of Ametal, in disrepair, thereby causing its value to be wasted." *Id at ¶56.* This cause of action, is again, wholly conclusory, which fails to establish how the actions of the Respondent have caused a loss of income, and allege what leads the Petitioners to conclude the building is in disrepair. *See Myers v. Schneiderman*, 30 N.Y.3d 1, 11 *reargument denied*, 30 N.Y.3d 1009 (2017).

[2] The Court, having reconsidered the grounds for dismissal stated on the January 29, 2018 record and transcript, clarifies and expands upon its earlier decision to dismiss this cause of action.

The cause of action for breach of fiduciary duty is therefore DISMISSED.[3]

IV. Petitioners' Derivative Cause of Action for Unjust Enrichment.

Unjust enrichment is a quasi-contract theory of recovery where the Plaintiff must show "that the other party was enriched, at the Plaintiff's expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *See Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 517 (2012). Whether Paul Vaccari, himself, or non-party Piccinini Bros., was enriched at Ametal's expense remains a viable derivative claim Petitioners may bring on behalf of Ametal.

Given that the standard of a CPLR 3211(a)(7) motion is to determine whether the facts alleged fit within any cognizable legal theory, the shareholders have pleaded a viable derivative claim on behalf of Ametal with respect to the alleged unjust enrichment. *See Leon v. Martinez*, 84 N.Y.2d 83, 86-87 (1994).

Petitioners have stated a cause of action for unjust enrichment.

V. Petitioners' Derivative Cause of Action for Conversion and Misappropriation.

Petitioners allege that the Respondents "wasted, diverted, or converted money they would otherwise be entitled to" which has damaged "Ametal and the Petitioners".[4] *See Pet.* ¶¶*64-65.*

[3] Even had the Plaintiff adequately provided sufficient supporting facts upon which to rest its claims, the Respondents have provided enough documentation through supporting affidavits and in their uncontested Statement of Material Facts pursuant to Rule 19-a of the Commercial Division Rules that summary judgment in the Respondents favor would be warranted. *See Infra §C.II.*

[4] Given that this court has already ruled that the Petitioners causes of action are Derivative, the Court merely addresses whether the Petitioners have stated a derivative cause of action against the Respondent and re-emphasizes its ruling that the Petitioners may only state derivative claims. *See supra §B.III.*

"A corporate officer who applies the funds of a corporation beyond the scope of his authority is guilty of conversion of corporate funds, and the corporation may maintain an action against him." *See Quintal v. Kellner*, 264 NY 32, 35 (1934); *see also TYT East Corp. v. Lam*, 139 A.D.3d 498, 501-02 (1st Dep't 2016).

Respondents admit that there is a certain amount owed by non-party Piccinini to Ametal as rental arrears resulting from non-party Rudy Vaccari's rental procedures. *See e.g. Paul Vaccari Aff.* ¶¶*28-31, Paul Vaccari Aff. Ex. 8; Monteferante Aff.* ¶¶*4-14*. Given that Respondent Paul Vaccari is the sole owner of non-party Piccinini, and Piccinini has been able to occupy commercial space without paying rent for a period of time, and that Paul Vaccari served first as Vice President and later as President of Ametal during the time period in question, Petitioners have stated a derivative claim for conversion and misappropriation. *See Leon*, 84 N.Y.2d at 87.

VI. Petitioners' Derivative Claim for Attorney's Fees

Petitioners allege that the Respondents have intentionally disregarded their obligations in a manner which has recklessly or wantonly interfered with the Petitioners' rights. *Pet.* ¶*69*. BCL § 626 conveys a limited right to obtain attorney's fees where the shareholders of a corporation have either made a pre-suit demand upon the corporation, or, shown that a pre-suit demand would have been futile. *See e.g. Culligan Soft Water Company v. Clayton Dubilier Rice, LLC*, 139 A.D.3d 621, 621-22 (1st Dep't, 2016).

Petitioners' claims rest upon the notion that the majority shareholder has been enriched at their expense, this Court may reasonably infer that a demand upon the corporation would have been futile. *See e.g. id* at 622. Further given that the standard of a motion brought pursuant to

CPLR 3211(a)(7) is merely to examine whether the Petitioner has stated a cause of action, the Petitioner's claim for attorney's fees survives dismissal. *See Leon,* 84 N.Y. at 86-87.

C. Respondents' Cross Motion for Summary Judgment on the Surviving Claims

Respondents have also moved for summary judgement pursuant to CPLR 404(a), CPLR 409(b), and CPLR 3212. Under CPLR 404(a), a party is permitted to raise an objection on a point of law. Under CPLR 409(b) the Court is permitted to make a summary determination upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised; and permits the Court to make orders which are permitted on a motion for summary judgment. CPLR 3212 permits a party to move for summary judgment.

In support of their dispositive motion the Respondents submitted a statement of material facts pursuant to Commercial Division Rule 19-a. Rule 19-a reads:

> (a) Upon *any* motion for summary judgement, other than a motion made pursuant to CPLR 3213, the Court may direct that there shall be annexed to the notice of motion, a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there are no genuine issues to be tried.
>
> (b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraph containing a separate short and concise statement of the material facts as to which it contended there exists a genuine issue to be tried.
>
> (c) Each numbered paragraph in the statement of material facts required to be served by the moving *will be deemed to be admitted for purposes of the motion, unless specifically controverted* by a correspondingly numbered paragraph in the statement to be served by the opposing party. *See 22 NYCRR §202.70(g) Rule 19-a (emphasis added)*

Justice Bransten's Part 3 Rules expressly put the parties on notice that a Rule 19-a statement is *always required* for Summary Judgment motions heard in Justice Bransten's Part. *See Hon. Eileen Bransten, Practices for Part 3, Motion Practice* ¶7 *(October 27, 2017).*

The Respondents' statement of material facts was not responded to in a like manner by the Petitioners. Rather, Petitioners merely state "Respondent's cross-motion is styled more as a motion for Summary Judgment than it is to dismiss. Inasmuch as Respondents' argument tends to rely heavily on factual arguments at a time prior to discovery having been conducted (or commenced), the same must be ignored as they are irrelevant here to their motion to dismiss the complaint for failure to state a claim". *See Pet. Opp. Br. p. 3; see also Respondent's Notice of Cross Motion* (moving under CPLR 404(a), 409(b), and 3212 for summary judgment).

A motion for summary judgment under CPLR 404(a), 409(b), and 3212 is proper where, as here, the Respondent seeks a summary determination at the pleading stage as a point of law. *See e.g. In re Cline*, 72 A.D.3d 471, 472-73 (1st Dep't 2010); *Matter of HGK Asset Management, Inc.*, 228 A.D.2d 246, 246 (1st Dep't, 1996) (granting a motion for summary determination at the pleading stage made by the Petitioner where the Respondent's answer failed to raise any question of material fact); *Application of Vallone*, 92 A.D.2d 799, 799-800 (1st Dep't, 1983); *Port of New York Auth. v. 62 Cortlandt St. Realty Co.*, 18 N.Y.2d 250, 255 (1st Dep't, 1966) (holding that the standards which govern summary judgment proceedings also govern motions pursuant to rule 409(b)).

Given that the Petitioners have failed to provide any counter statement of material facts in reply pursuant to Commercial Division Rule 19-a, the Respondents' version of material facts must be deemed to be admitted to in full. *Compare 22 NYCRR §202.70(g)* (stating any fact

which is not expressly disputed in the statement of material facts will be deemed admitted pursuant to Rule 19-a(c)) *with 62 Cortlandt St. Realty Co.* 18 N.Y.2d at 255 (holding that the standards governing summary judgment will also govern Rule 409(b) motions); *see also Hon. Eileen Bransten, Practices for Part 3, Motion Practice ¶7 (October 27, 2017)* (requiring any motion for summary judgment before Justice Bransten to be accompanied with a Rule 19-a statement of material facts).

I. Petitioner's Derivative Claim for Unjust Enrichment

Unjust enrichment is a quasi-contract theory of recovery requiring the Petitioners to show that the Respondents were enriched at the Petitioners' expense an that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. *See Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012). Here, Respondent Paul Vaccari hired an accounting firm to determine the statues of business finances and, as a result of the accountant's advice, has subsequently established a payment plan to bring non-party Piccinini Bros. current on its rental arrears, with interest. *See Paul Vaccari Aff.* ¶¶*28-31*; *Paul Vaccari Aff. Ex. 8; Monteferante Aff.* ¶¶*4-14*. Pursuant to Respondents' Rule 19-a statement of material facts, Piccinini has paid rent due to Ametal Realty. ¶¶*27, 28*. Therefore, this Court finds that the Respondents have stopped receiving the benefit of any prior enrichment and have already returned those benefits back to Ametal Realty. This warrants granting summary judgment in the Respondents' favor.

II. Petitioners' Derivative Cause of Action for Breach of Fiduciary Duty

Had the Petitioner adequately stated a claim for breach of fiduciary duty, this Court, nonetheless notes that the claim would not survive the motion for summary judgment. To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct. *See Castellotti v. Free*, 138 A.D.3d 198, 209 (1st Dep't 2016). The Statement of Material Facts indicates that any alleged breach of fiduciary duty has either been compensated or is in the process of being compensated. *See Statement of Material Facts ¶¶27-29; Paul Vaccari Aff. ¶¶28-33; Monteferante Aff. ¶¶6-14.* As a result of the efforts to cure, the corporation has sustained no damages and summary judgment must be entered in the Respondents' favor.

III. Petitioners' Derivative Claim for Conversion and Misappropriation

A corporate officer who applies the funds of a corporation to purposes beyond the scope of his authority is guilty of conversion of the corporate assets, and the corporation may maintain an action against him. *See Quintal v. Kellner*, 264 N.Y. 32, 35 (1934); *see also TYT East Corporation v. Lam*, 139 A.D.3d 498, 501-02 (1st Dep't 2016). In this instance, however, rather than start an action for conversion against Respondent Paul Vaccari, the corporation hired an accountant who relabeled Piccinini Bros. prior "corporate loans" as accounts receivable and established a payment plan which would compensate Ametal Realty for all rental arrears with interest. *See Paul Vaccari Aff. ¶¶28-31; Paul Vaccari Aff. Ex. 8; Monteferante Aff. ¶¶4-14.* Piccinini Bros. has paid rent due and owing to Ametal since the restructuring. *See Statement of Material Facts ¶27.*

The good faith decisions made by the majority shareholder of Ametal to permit compensation with interest and in making attempts to obtain a mortgage to conduct necessary repairs on the Property will not be questioned by this Court. *See Lorne v. 50 Madison Av, LLC*, 65 A.D.3d 879, 880 (1st Dep't 2009) (stating courts should exercise restraint and defer to decisions made in good faith about the corporation). Therefore, this Court finds that summary judgment is warranted in favor of the Respondents for their good faith decision to allow compensation rather than pursue a suit.

IV. Petitioners Claim for Attorney's Fees

Section 626(e) of the Business Corporate Law of New York permits shareholders to obtain attorneys' fees "if the action on behalf of the corporation was successful". All other causes of action in the Petition have been dismissed, therefore, the Petitioners have **not** been successful in their cause of action, and are unable to recover attorney's fees.

** Continued on the Following Page**

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D. Decision and Order

Upon the foregoing it is hereby

ORDERED the Petitioners' Motion for a Preliminary Injunction is DENIED; further

ORDERED the Petitioners' Motion for Corporate Dissolution is DENIED; and it is further

ORDERED the Respondents' Cross-Motion to Dismiss is GRANTED with prejudice.

3/ 28 /2018
DATE

CHECK ONE:	[X]	CASE DISPOSED	[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER		
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