SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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JORGE LAMORENA,

Plaintiff

Index No. 654491/18

v

DECISION AND ORDER

JANNETTE CATHERINE MALLOY

MOT SEQ 001

Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action pursuant to Business Corporation Law (BCL) §1104-a for the dissolution of a closely held corporation and the appointment of a receiver, the plaintiff, Jorge LaMorena, moves pursuant to BCL § 1113 for the appointment of a temporary receiver for JJLM Pharmacy, Inc., the corporation he co-owns with defendant Jannette Malloy, each being a 50% shareholder. The gravamen of the complaint is that Malloy breached her fiduciary duty by diverting corporate assets for her own personal use.

Defendant Malloy cross-moves for summary judgment dismissing the complaint on the ground that it is procedurally improper, in that article 11 of the BCL requires that it be brought by a petition (BCL §1105), and, in any event, any action or proceeding is barred by the doctrines of res judicata or collateral estoppel (CPLR 3211[a][5]) based on a prior action commenced by her

against LaMorena. The motion and the cross-motion are opposed. Both are denied without prejudice.

II. BACKGROUND

The dispute between these two parties is the subject of a separate related action, pending before this court (Joel Cohen, J.) entitled Jannette Malloy v Jorge Lamorena, Index No. 656111/2017. In that action, Malloy claims, *inter alia*, that LaMorena breached the parties' partnership agreement and that he breached his fiduciary duty to Malloy by failing to contribute additional capital or services to the business as agreed. Malloy accused LaMorena of self-dealing and other conduct intended to damage JJLM Pharmacy, Inc., such as opening nearby competing pharmacies. Malloy also accused LaMorena of making false statements to vendors relating to her reputation as a licensed pharmacist. The complaint sought $1,000,000 in damages and injunctive relief under theories of breach of contract, breach of fiduciary duty and defamation.

LaMorena failed to appear in that action. Malloy was awarded a default judgment by an order dated July 2, 2018 (Bransten, J.), which also directed a hearing on damages. By an order dated August 21, 2018, the court (Bransten, J.) granted the plaintiff's unopposed motion for an order of attachment upon LaMorena's checking account at Bank of America in the sum of $170,000.

On April 29, 2019, JHO Philip Straniere issued a report and recommendation finding that plaintiff Malloy had failed to demonstrate that she had personally suffered damages as a result of any misconduct by the defendant, but observed that she might have claims that could be brought on behalf of the corporation. Malloy moved to reject the report and LaMorena cross-moved to confirm the report. By an order dated January 1, 2020, the court (Cohen, J.) granted each motion in part. The court rejected the JHO's finding that Malloy had suffered no damages and remanded the case back to the JHO "for a determination of damages, if any, without regard to any defenses [LaMorena] might have interposed had he not defaulted." The court cited the principle that "by defaulting, a defendant admits all traversable allegations contained in the complaint, and thus concedes liability, although not damages." Christian v Hashmet Mgmt. Corp., 189 AD2d 597, 598 (1st Dept. 1993). That hearing on remand has not yet been held.

In the meantime, LaMorena commenced the instant action in September 2018, after the motions in the prior action were filed. In this action, he seeks dissolution of the corporation pursuant to BCL §1104-a and the appointment of a receiver pursuant to BCL §§1113 and 1202(a)(1). In the complaint, he alleges that he and Malloy established the corporation and opened the pharmacy in 2015, with Malloy to serve as the full-time supervising pharmacist and LaMorena to work part-time. According to LaMorena,

Malloy "began regularly paying her personal expenses with pharmacy funds" from January 2016 through June 2018. LaMorena alleges that Malloy, using the pharmacy account and funds, paid her personal American Express card account, purchased groceries at Whole Foods, paid restaurant bills and entertainment expenses to Ticketmaster, Carnegie Hall and TDI Broadway, paid her EZ Pass and parking ticket expenses, made donations to a church and gave cash gifts to her husband.

Malloy answered with general denials and asserted several affirmative defenses, including res judicata and collateral estoppel, failure to state a cause of action, unclean hands and breach of fiduciary duty.

LaMorena then made the instant motion seeking the appointment of a temporary receiver, and Malloy cross-moved for summary judgment dismissing the complaint.

In support of her cross-motion, Malloy maintains that the plaintiff improperly seeks dissolution of the corporation under article 11 of the BCL without having adhered to the procedural requirements of that article, which provides that such action be commenced by a verified petition that complies with specifically enumerated requirements rather than by commencing the dissolution action by a summons and complaint. See La Sorsa v Algen Press Corp., 105 AD2d 771 (2nd Dept. 1984).

Malloy further argues that LaMorena's default in the prior action bars him from contesting liability under the principles of res judicata or collateral estoppel.

In response to LaMorena's contention that Malloy had locked him out of the pharmacy, Malloy accuses LaMorena of becoming verbally and physically abusive toward her in January 2016, and that she had called the police and changed the locks after that incident and after LaMorena told her that he wanted nothing more to do with the business. In her affidavit, she further alleges that he stopped performing any work for the business well prior to February 2016 and did not otherwise contribute to expenses other than minimal and undocumented startup costs. Malloy maintains that LaMorena stole $170,000 from the business account after he abandoned the business, and $12,000 prior to that time. Malloy alleges that she contributed $105,625.00 in additional labor after LaMorena abandoned the business. Malloy claims that he thereafter refused to negotiate a buyout agreement in good faith.

As to LaMorena's allegations that she used business funds to pay personal expenses, Malloy does not dispute that the specified payments were made but claims that the payments occurred after LaMorena abandoned the business, were for valid business purposes and were warranted due to her own contributions to the business.

In reply, LaMorena, who defaulted in the prior action, now addresses Malloy's allegations first made in that action that he stole $170,000 from the corporate account. He claims that he had access to the corporate account through July 2018 and calculated that $170,000 was his share of the profits, and withdrew that amount. He denies taking $12,000 prior to that time. LaMorena does not dispute that he failed to work at the pharmacy as per the parties' agreement. However, he denies being verbally or physically abusive toward Malloy at any time.

III. DISCUSSION

(A) LaMorena's Motion for Appointment of Temporary Receiver

Resort to a receivership is appropriate only when necessary for the protection of the interests of the parties. See Armienti v Brooks, supra; Matter of Harrison Realty Corp., supra. Such an appointment is warranted only where a party has adequately demonstrated his or her apparent interest in the property at issue, and shown that there is a danger of irreparable loss and damage to such property. See CPLR 6401; Matter of Sobol, 14 AD3d 426 (1st Dept. 2005); Dolgoff v Projectavision, Inc., 235 AD2d 311 (1st Dept. 1997). That was not shown here.

LaMorena does not, on these papers, establish grounds for the appointment of a temporary receiver in this action for the dissolution of a closely held corporation, since he did not make

a clear showing of danger of irreparable loss, or that the corporation's assets were being diverted or wasted, only that Malloy engaged in poor business judgment. See Moran v Moran, 77 AD3d 443 (1st Dept. 2010); Armienti v Brooks, 309 AD2d 659 (1st Dept. 2003); Matter of Harrison Realty Corp., 295 AD2d 220 (1st Dept. 2002). To the extent that LaMorena can establish that Malloy diverted or wasted corporate assets for personal use, he will have a remedy. Any inequity created by or resulting from the alleged misuse or of the corporation's assets or questionable business decisions may be properly addressed "in the final accounting submitted to the court in the course of effecting the dissolution" (Matter of Harrison Realty Corp, supra at 221) or "as an aid in post-judgment enforcement (see CPLR 5228)." Lemle v Lemle, 92 AD3d 494, 498 (1st Dept. 2012), quoting Old Republic Natl. Title Ins. Co. v Cardinal Abstract Corp., 14 AD3d 678, 680-681 (2nd Dept 2005). LaMorena's withdrawal of $170,000 from the corporate account will also factor into any such accounting.

(B) Malloy's Cross-Motion for Summary Judgment

Malloy seeks summary judgment dismissing the complaint on two grounds - (1) that it is procedurally improper, in that article 11 of the BCL requires that it be brought by a petition (BCL §1105), and, in any event, (2) any action is barred by the doctrines of res judicata or collateral estoppel (CPLR

3211[a][5]) based on a prior action. Neither ground is a basis for dismissal of the complaint at this juncture.

First, although LaMorena failed to seek a dissolution by petition, the misstep is not fatal to that relief. In that vein, LaMorena argues that the court may overlook his failure to comply with the statutory requirements in the BCL and deem his complaint as one seeking common law dissolution and not dissolution under the BCL. The court may permit a plaintiff to add a cause of action for the equitable dissolution of the corporation under Business Corporation Law §§ 1104 and 1104-a. See Hellenic Am. Educ. Found. v Trustees of Athens Coll. in Greece, 116 AD3d 453, 454 (1st Dept. 2014); Matter of Lund v Krass Snow & Schmutter, P.C., 62 AD3d 551, 552 (1st Dept. 2009); Matter of Neville v Martin, 29 AD3d 444, 444-445 (1st Dept 2006). The case law allows the court to grant the plaintiff the right to amend his pleadings to convert his action for statutory dissolution into a petition for common-law dissolution, *nunc pro tunc*. No such motion has yet been made by LaMorena. See Gjuraj v Uplift Elevator Corp., 110 AD3d 540 (1st Dept. 2013); Fedele v Seybert, 250 AD2d 519 (1st Dept 1998).

Nor does Malloy establish her second ground for summary judgment. The doctrine of res judicata prohibits a party from re-litigating any claim which could have been, or which should have been litigated in a prior proceeding (see Buechel v Bain, 275

AD2d 65 [1st Dept. 2001]; Klein v Barrios-Paoli, 237 AD2d 165 [1st Dept. 1997]), and once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (see O'Brien v. City of Syracuse, 54 NY2d 353 [1981]). That is, "[u]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action." Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 347 (1999); see Matter of Reilly v Reid, 45 NY2d 24 (1978). As a general rule, New York applies a "transactional approach" to analyzing the doctrine of res judicata, so that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." O'Brien v Syracuse, supra at 357 (1981).

The doctrine of collateral estoppel, or issue preclusion, "precludes a party from re-litigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point." Kaufman v Eli Lilly & Co., 65 NY2d 449 (1985). Collateral estoppel requires two distinct elements: "that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom

preclusion is sought was accorded a full and fair opportunity to contest the issue." Allied Chem. v. Niagara Mohawk Power Corp., 72 NY2d 271 (1988); In re Hofmann, 287 AD2d 119 (1st Dept. 2001). While some issues presented in this action may be precluded, such a determination would be made upon the conclusion of the prior action. As noted, the matter remains sub judice awaiting a new hearing before the JHO.

Malloy is correct in arguing that by defaulting in the prior action LaMorena has admitted all allegations made by her in that action. Indeed, having failed to answer, LaMorena is "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003). See Christian v Hashmet Mgmt. Corp., 189 AD2d 597, 598 (1st Dept. 1993). Moreover, the doctrine of res judicata applies to a judgment entered on default which has not been vacated. See See Richter v Sportsmans Properties, Inc., 82 AD3d 733 (2nd Dept. 2011); CIBC Mellon Trust Co. v HSBC Guyerzeller Bank AG, 56 AD3d 307 (1st Dept. 2008). Thus, Malloy's unopposed claims in the prior action regarding LaMorena's breaches may ultimately support her defenses in this action, particularly those of unclean hands and breach of fiduciary duty. However, this does not mandate that the instant complaint be dismissed at this time as barred by the principles of res judicata or collateral estoppel, as no judgment has been

entered in the prior action. Furthermore, while there is an identity of parties in the two actions, there is no identity of issues. Malloy's action primarily concerns LaMorena's conduct and breach of the parties' agreement, breach of fiduciary duty and defamation. LaMorena's action primarily concerns Malloy's conduct and breaches. Thus, Malloy has not demonstrated that the doctrine of res judicata or collateral estoppel is applicable for purposes of this motion.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the

issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970). Malloy did not meet this burden.

Further, where, as here, it appears that the facts essential to oppose a motion for summary judgment "exist but cannot then be stated" (CPLR 3212[f]), a court may deny the motion. See Schlichting v Elliquence Realty, LLC, 116 AD3d 689 (2nd Dept. 2014); Wesolowski v St. Francis Hospital, 108 AD3d 525 (2nd Dept. 2013). "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." Wesolowski v St. Francis Hospital, supra at 526 [internal quotation marks omitted]; see Belziti v Langford, 105 AD3d 649 (1st Dept. 2013); Blech v West Park Presbyterian Church, 97 AD3d 443 (1st Dept. 2012). Discovery is not complete in this case. The most recent status conference order, dated January 23, 2020, indicates that depositions of the parties had not been held, and Malloy had not turned over all requested bank records. In light of the nature of the parties' allegations here, depositions and full document disclosure are necessary.

IV. CONCLUSION

For the reasons stated above, the motion and cross-motion are denied without prejudice. The parties are encouraged to continue to make best efforts to resolve their dispute or, in the alternative, comply with any court-ordered mediation.

Accordingly, it is hereby,

ORDERED that the plaintiff's motion is denied without prejudice; and it is further,

ORDERED that defendant's cross-motion is denied without prejudice.

This constitutes the Decision and Order of the Court.

Dated: May 22, 2020

NANCY M. BANNON, J.S.C.
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