Pinto v Schinitsky
2022 NY Slip Op 33360(U)
October 4, 2022
Supreme Court, New York County
Docket Number: Index No. 655020/2019
Judge: Joel M. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

----------X

DAVID PINTO,

Plaintiff,

- v -

SUSAN SCHINITSKY, RACHER PRESS, INC.

Defendants.

INDEX NO. 655020/2019

MOTION DATE N/A

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

----------X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287
were read on this motion for SUMMARY JUDGMENT.

This is a derivative action, brought by Plaintiff David Pinto ("Pinto"), the 49 percent shareholder of nominal defendant Racher Press Inc. ("Racher" or the "Company"), against his former spouse Defendant Susan Schinitsky ("Schinitsky"), Racher's majority shareholder. This action involves allegations of misappropriation of corporate assets, breach of fiduciary duty, unjust enrichment, and waste.

Defendant now moves for partial summary judgment seeking to dismiss Plaintiff's derivative claims for three categories of damages: (i) Defendant's allegedly "excessive" compensation; (ii) salary paid to Defendant's mother, Clare Schinitsky; and (iii) the consultancy fees paid to Dennis Neier. Defendant also seeks an order precluding evidence from non-parties Brian Kipnis and Mark S. Gottlieb on the issue of whether Defendant's compensation was "excessive." For the reasons stated below, Defendant's motion is denied.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2d Dept 2007]).

I. Whether Kipnis or Gottlieb can Provide Expert Testimony on the Reasonableness of Defendant's Compensation.

Defendant argues neither Gottlieb nor Kipnis are qualified to opine on the reasonableness of Susan's compensation, and without Kipnis's or Gottlieb's testimony, summary judgment should be granted barring damages based on Susan's allegedly "excessive compensation." Defendant's theory is flawed.

First, it is well-settled that "[t]he amount of compensation to be paid corporate officers is properly a matter for the business judgment of the board of directors. Their judgment in this respect is final and subject to interference by the court only 'in cases of clear abuse bad faith or fraud for the benefit of the corporation'" (*Sandfield v Goldstein*, 33 AD2d 376, 380 [3d Dept 1970], affd, 28 NY2d 794 [1971], quoting *Garbarino v Utica Uniform Co.*, 269 AD 622, 626-27 [4th Dept 1945], *affd* 295 NY 794 [1946] [internal punctuation omitted]).

However, "directors who approve their *own* compensation bear the burden of proving that the transaction was fair to the corporation" (*Marx v Akers*, 88 NY2d 189, 204 n 6 [1996]

[emphasis added]). "Like any other interested transaction, directoral self-compensation decisions lie outside the business judgment rule's presumptive protection, so that, where properly challenged, the receipt of self-determined benefits is subject to an affirmative showing that the compensation arrangements are fair to the corporation" (*Lippman v Shaffer*, 15 Misc 3d 705, 712 [Sup Ct, Monroe County 2006]).

While it is true that where there is "merely a difference of opinion between a stockholder and directors as to the value of an employee's services," a corporate officer will not be held personally liable for compensation received (*Sandfield*, 33 AD2d at 380), this case does not involve merely a difference of opinion. Here, Plaintiff and Defendant are the only shareholders of Racher, and Defendant's compensation is considerably higher than Plaintiff's. While the circumstances may support that the difference in salary is appropriate, Plaintiff denies that he ever approved Defendant's increase in salary. As Defendant fails to submit any proof that Plaintiff did, in fact, approve Defendant's increase in salary, it is Defendant's burden to prove that the compensation arrangement is fair to the corporation. Defendant's argument incorrectly assumes that if Plaintiff has no witnesses to establish that Defendant's compensation was unreasonable, Plaintiff's claim of excessive compensation is precluded.

Second, Defendant's motion to preclude Kipnis from testifying as an expert witness on compensation is denied as moot. Plaintiff has submitted that it intends to call Kipnis as a fact witness, not an expert witness.

Next, Defendant moves to exclude the expert testimony of Mark Gottlieb. Gottlieb is a Certified Public Accountant (CPA) licensed to practice in the State of New York and Connecticut. Defendant argues that Gottlieb has no specific training in compensation studies, that the reference source he used, RC Reports, was deficient, and that his use of it was incorrect.

"It is well settled that the Supreme Court has broad discretion in accepting or rejecting all or part of any expert testimony" (*Madonna v Madonna*, 265 AD2d 455, 455 [2d Dept 1999]). "An expert is qualified to proffer an opinion if he or she possesses the requisite skill, training, education, knowledge, or experience to render a reliable opinion" (*de Hernandez v Lutheran Med. Ctr.*, 46 AD3d 517, 518 [2d Dept 2007]).

Here, Gottlieb has degrees in accounting and taxation and holds a number of certifications and accreditations in business valuation and forensic accounting (NYSCEF 258 ¶¶42-44 [Gottlieb Aff.]). Gottlieb submits that he has extensive experience in conducting forensic accounting examinations, preparing independent business and professional practice valuations, calculations of enhanced earnings capacity relating to professional licenses and degrees, lifestyle analyses prepared in conjunction with matrimonial matters, and has been employed by the international accounting and consulting firms of PriceWaterhouseCoopers (formerly Coopers & Lybrand) and Ernst & Young (formerly Ernst & Whinney) (NYSCEF 258 ¶¶45-46). As set forth in Gottlieb's June 14, 2021 Affidavit, Gottlieb clarifies while he does not have "training focusing specifically and exclusively on reasonable compensation, it was 'part and parcel' of my work as a business valuation and forensic accounting expert" (NYSCEF 275 ¶ b). Mr. Gottlieb goes on to note that he is credentialed as a valuation expert by four credentialling organizations; the American Institute of Certified Public Accountants, The American Society of Appraisers, The National Association of Certified Valuation Analysts, and The Institute of Business Appraisers (*id.*). Finally, Mr. Gottlieb explains that "[t]he approaches and methodologies to determine reasonable compensation are taught and made part of the training and maintenance of these credentials. There is no specific designation that provides expert status in determining reasonable executive compensation" (*id.*).

Defendant also objects to Gottlieb's testimony regarding her reasonable compensation due to the use of the data and reporting by RC Reports. Gottlieb explains that "The RC Report platform generates a range of reasonable compensation data points based upon three major methodologies, the Cost, Market, and Income approaches. Each methodology considers specific attributes of the subject and is selected by the analyst. In this instance, I selected the Market Approach, which generally works best for business such as Racher Press, Inc, and its owners. I explained my reasons for choosing it at considerable length to Defendant's counsel on the record at my deposition" (NYSCEF 275 ¶ d, citing deposition transcript at NYSCEF 274 at 102-03). A review of Gottlieb's deposition testimony, his affidavit, the RC Reports' methodology of January 2021, and Gottlieb's original report and curriculum vitae (NYSCEF 274, 275), leads the Court to the conclusion that Gottlieb has sufficient training, education, knowledge, or experience to render an opinion on Defendant's compensation.

Further, an expert witness can testify on the basis of knowledge that does not constitute his main field of expertise, but is still sufficient to assure his competency. In such a situation, any defects with the expert's testimony go to weight, not admissibility (*Sadek v Wesley*, 27 NY3d 982, 984 [2016] ["As the Appellate Division noted, any defects in the opinions of plaintiff's experts or the foundation on which those opinions are based should go to the weight to be accorded that evidence by the trier of fact, not to its admissibility, in the first instance"]; *Dorfman v Reffkin*, 2020 NY Slip Op 32469[U], 16 [Sup Ct, NY County 2020] ["Whether [an expert] is sufficiently familiar with compensation in the field at issue here is question of weight and for the jury to determine"]). Thus, Defendant can examine the credibility of Gottlieb's testimony at trial, but Defendant has not shown grounds for preclusion of that testimony.

II. Claims Based on Salary Paid to Clare Schinitsky.

Defendant next argues that the causes of action for damages based on salary paid to Clare Schinitsky should be dismissed because the record shows that Plaintiff ratified the salary paid to Clare Schinitsky. "Ratification is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority" (*Holm v C.M.P. Sheet Metal, Inc.*, 89 AD2d 229, 232 [4th Dept 1982]).

The "ratification" to which Defendant refers is Plaintiff's deposition testimony that in light of his personal fondness for Clare, he would not have objected to paying her had he been asked (Pinto Tr. 127:23-128:13). Defendant has not submitted any evidence showing that Plaintiff agreed or ratified the payment of Clare's salary during the relevant time periods. Further, Defendant's case law is inapposite. In *Field v Lew* (184 FSupp 23, 26 [EDNY 1960]), there was only one shareholder, enabling him to ratify his own actions. In *Blake v Blake* (225 AD2d 337 [1st Dept 1996]), there was ratification by formal action of the Board of Directors, requiring plaintiff then to demonstrate that no person of ordinary sound business judgment would say that the corporation received fair benefit. Here, Defendant could not ratify her own actions, as she is not the only shareholder. Further, Defendant cannot argue that Clare's salary was ratified by formal action by the Board of Directors, as Racher has no Board of Directors.

While Defendant may be correct in its theory of ratification, the record before the Court does not establish whether or not Plaintiff knew about the salary paid to Clare Schinitsky, and whether Plaintiff accepted any benefits from this arrangement. These facts are essential to Defendant's ratification claim (*see, e.g.*, *Wilson v Neppell*, 253 AD2d 493, 494 [2d Dept 1998] ["Where, as here, the plaintiff accepted the benefits of the parties' agreement for over three years

without objecting, she is deemed to have ratified the contract."]). Accordingly, Defendant's motion for summary judgment on the claims involving salary to Clare Schinitsky is denied.

III. Claims Based on Payments Made to Neier.

Finally, Defendant asks that the Court grant summary judgment dismissing the claims for damages based on Racher's payments of Neier's consulting fees. As Plaintiff argues, there is no separate count for damages based upon Neier's consulting fees. The fact that Defendant hired him for a fixed $10,000 per month fee is mentioned in paragraph 22 of the Amended Verified Complaint. The allegation that Neier, while purportedly serving Racher, in reality acted as an advisor to Defendant, is made in paragraphs 29 and 31. These allegations would bare upon Count II for Breach of Fiduciary Duty, which includes waste and mismanagement, and Count IV for Waste of Corporate Assets, which also includes mismanagement.

A director or officer may be held liable for negligent mismanagement leading to waste of corporate assets, whether or not she personally profits from such conduct (*e.g., Rapoport v Schneider*, 29 NY2d 396 [1972] ["It is and has always been general law that a director may be held accountable for the waste of corporate assets whether intentional or negligent without limitation to transactions from which he benefits."]; *Shapiro v Rockville Country Club, Inc.*, 22 AD3d 657, 658 [2d Dept 2005] [citing *Rappeport*]). While Racher never had a Board of Directors, Plaintiff and Defendant apparently assumed the roles of both officers and directors in running the company. It remains an issue of fact as to whether Defendant usurped the roles of Board of Directors and Chief Executor Officer without consulting Plaintiff. Likewise, there is an issue of fact as to whether his retention at a fixed rate of $10,000 per month at Defendant's behest constitutes waste and dissipation of corporate assets.

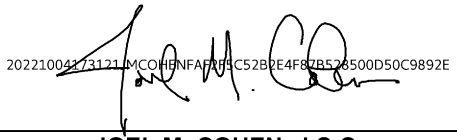
Accordingly, it is

ORDERED that Defendant's motion for summary judgment is **denied**; it is further

ORDERED that a jury trial in this matter will take place the week of April 10, 2023; it is further

ORDERED that the parties are to appear for a pre-trial conference on February 20, 2023 at 2:30 pm.

This constitutes the decision and order of the Court.



10/4/2022
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE