SCANNED ON 1/26/2007

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HELEN E. FREEDMAN, Justice — PART 39

RUTH KASSOVER, et al.

Plaintiffs,

- v-

PRISM VENTURE PARTNERS, et al.

Defendants.

INDEX NO. ~~602404/05~~ 602434/05

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	
Answering Affidavits – Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with accompanying memorandum decision.

Dated: January 19, 2007

HEF

Helen E. Freedman, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED

JAN 26 2007

COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39
- -x

RUTH KASSOVER, as co-executor of THE ESTATE OF NATHAN KASSOVER, and PHILIP KASSOVER, in his individual Capacity,

Index No. 602464/2005

Plaintiffs,

-against-

PRISM VENTURE PARTNERS, LLC, PVP-GCC HOLDINGCO II, LLC, THE GARDEN CITY COMPANY, INC., RICHARD SABELLA, ROSALIE ERICKSON, in her individual capacity and as personal representative of THE ESTATE OF MAX KASSOVER, RICHARD BAIME, LULU KASSOVER, HARRIETTE K. BAIME, LLC, MORTON KASSOVER, HARRIETTE K. BAIME and MORTON KASSOVER as executors of THE ESTATE OF SAMUEL KASSOVER, SLOBODIEN FAMILY PARTNERSHIP, LP and R. PEYTON GIBSON,

Defendants.

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HELEN E. FREEDMAN, J.:

In this action, plaintiffs assert that they received insufficient consideration for their shares in a real estate company following a court ordered merger. Defendants move to dismiss for failure to state a claim, failure to plead fraud with particularity, and on the grounds of collateral estoppel and lack of standing (CPLR 3211[a][1], [5] and [7] and CPLR 3016[b]).

THE COMPLAINT/BACKGROUND

This action is part of a decades-long dispute among members of the Kassover family over the governance and finances of closely-held real estate interests. The following facts are taken from the complaint, the relevant transactional documents and judicial records annexed to the affidavits of the parties. The background of this case has been set forth in numerous state and federal court decisions, and will be repeated here only as necessary.

Plaintiff Ruth Kassover ("Ruth") is co-executor of the Estate of Nathan Kassover (the "Estate"), which owned approximately 19% of the outstanding shares of The Garden City Company ("Garden City") when in 2002 it was acquired by and merged into defendant PVP-GCC Holdingco II, LLC ("PVP"). Philip Kassover ("Philip") owned approximately 2.5% of Garden City's pre-merger shares. However, Philip directly or indirectly controlled 22% of Garden City's stock, including those shares held by the Estate, and acted as the company's de facto chief executive officer beginning in 1996.

Lawrence Kassover ("Lawrence") (now deceased) was a 5.66% shareholder of Garden City who filed for Chapter 11 protection in 1998. Consequently, many of the transactions among the parties, including the merger, have been supervised by the United States

Bankruptcy Court for the Southern District of New York. Defendant R. Peyton Gibson was the Chapter 11 Trustee for Lawrence, and is the Trustee of the Liquidation Trust which succeeded to ownership of Lawrence's Garden City shares.

Defendant Richard Sabella ("Sabella") is the principal owner of defendant Prism Venture Partners, LLC ("Prism"). Prism formed PVP for the purpose of acquiring and merging with Garden City. Prior to the merger, Garden City's directors were defendants Rosalie Erickson, Richard Baime and Lulu Kassover (the "Board Defendants"). The Board Defendants and defendants Harriette K. Baime, LLC, Morton Kassover and Slobodien Family Partnership, LLP were shareholders of Garden City prior to its merger in either their individual and/or representative capacities.

The terms of the merger were set forth in a proposed Agreement and Plan of Merger (the "Merger Agreement") dated July 16, 2002. Garden City's shareholders approved the merger on July 26, 2002, although Philip voted against it. On July 29, 2002, after a hearing, the merger was approved by order of the bankruptcy court (the "Merger Order"). Philip's appeals of the Merger Order to the District Court and the Second Court of Appeals were denied (see, Kassover v Gibson, 2003 WL 21222341 [SDNY 2003]; Kassover v Gibson, 2004 WL 693410 [2d Cir 2004]).

The Merger Agreement provided that Prism would pay $2,000 per share to the Garden City shareholders (the "Merger Consideration"). As a condition precedent to payment, the Merger Agreement required that each shareholder satisfy any outstanding monetary obligations to Garden City. The Merger Agreement provided for additional consideration (the "Assignment Consideration") of $525 per share contingent upon delivery of an assignment of claims under a 1976 Shareholders Agreement (the "1976 Shareholders Agreement").

The Merger Agreement designated Gibson as Disbursing Agent for the funds to be distributed thereunder. After initially refusing to pay the plaintiffs, Gibson distributed $879,630 ($322 per share for 2728 shares) to the Nathan Kassover Estate[1], and $61,490 ($169 per share for 363 shares) to Philip.

Plaintiffs commenced this action in July 2005. The complaint alleges, inter alia, that plaintiffs have not been paid their full entitlement under the Merger Agreement. Specifically, plaintiffs allege that part of the $2,000 per share Merger Consideration was withheld based on unsubstantiated "monetary obligations," that they were unreasonably denied the $525 per

[1]Plaintiffs assert that after this action was filed, Gibson paid an additional $1,678 per share (i.e., the balance of the Merger Consideration) to the Nathan Kassover Estate).

share Assignment Consideration, and that all the other shareholders received $3,117 per share, including $592 per share in additional consideration that was not paid to plaintiffs. The complaint asserts twelve causes of action including violation of Business Corporation Law (BCL) § 501(c), breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract, tortious interference with contract and unjust enrichment. Plaintiffs seek the imposition of a constructive trust and certain injunctive relief, as well as payment of various judgments, arbitration awards and other claims allegedly owed by Garden City.

In August 2005, the Trustee and Prism removed this action to the United States District Court for the Southern District of New York. Plaintiffs filed a motion to remand the matter back to this court. The case was referred to the bankruptcy court, which, in a January 12, 2006 order, granted the motion to remand (see, Kassover et ano v Prism Venture Partners, LLC, et al., 336 BR 74 [Bankr. SDNY 2006][Lifland]) (the "Remand Order"). The court found that "[a]t best, the State Court action is tangentially related to events that occurred during the Debtor's bankruptcy proceeding" (see, Kassover, supra at 80). The instant motion followed.

DISCUSSION

For the following reasons, the motion to dismiss is granted as to the second through seventh and ninth through twelfth causes of action. It is also granted as to the first cause of action (violation of BCL § 501) to the extent it seeks recovery of the Assignment Consideration, and to the extent it is asserted against the Board Defendants. The motion is otherwise denied as to the first cause of action, and is denied as to the eighth cause of action (breach of contract against Gibson).

Business Corporation Law § 501(c)

The first cause of action asserts a violation of BCL § 501(c), which provides that "each share shall be equal to every other share of the same class." The statute provides a remedy for "unequal treatment among small private shareholders" Beaumont v Amer. Can Co., 160 AD2d 174, 175 [1st Dept 1990]). Its provisions have been strictly enforced, and "[t]he rights of shareholders embodied in § 501(c) cannot be waived or overridden by any other statute, including remedies available to dissenting shareholders" (Beaumont v Amer. Can Co., 5/20/91 NYLJ 25 (Col. 3). Although BCL § 623(k) generally provides that an appraisal is a dissenting shareholder's exclusive remedy, it provides for an exception where "an unlawful act has been committed by the corporation" (Beaumont, supra, 5/20/91 NYLJ 25).

The complaint adequately pleads that defendants' failure to pay full consideration for plaintiffs' shares violated the Merger Agreement, resulting in a de facto violation of section 501(c). Specifically, plaintiffs state a viable claim by alleging that Philip Kassover received only $169 per share of the $2,000 required by the agreement, and that neither Philip nor the Nathan Kassover Estate received the additional $592 per share received by other shareholders. However, since the complaint concedes that plaintiffs failed to timely submit the assignment that the Merger Agreement required as a condition precedent to receiving the Assignment Consideration, they may not pursue that item of damages.

Defendants' argument that res judicata and/or collateral estoppel bar the claims because the merger was court-ordered and approved is without merit. Plaintiffs do not challenge the validity of the merger or the valuation of the Garden City stock. Rather, they assert that after the merger, defendants failed to pay them the contractually required monetary consideration and favored other shareholders with additional consideration. That allegation was not in issue in the prior merger approval hearings or passed upon by any of the reviewing courts.

Defendants also argue that complaint does not plead discriminatory treatment under section 501(c) because the express

terms of Merger Agreement treat all shares equally, and because plaintiffs did, in fact, receive all they were entitled to after deductions for certain monetary obligations. Once again, plaintiffs do not dispute that the Merger Agreement is facially fair, but challenge whether the payout they ultimately received complied with its terms. While defendants have established a valid contractual basis for disallowing the Assignment Consideration, a factual question still exists over the proper amount of the monetary obligations deducted and the validity of the $592 per share payment allegedly received by other shareholders. That dispute cannot be resolved by reference to the complaint or underlying transactional documents.

The first cause of action is dismissed as against the Board Defendants. The Board ceased to exist after the effective date of the merger in 2002. Accordingly, it could not have participated in the allegedly discriminatory conduct in 2003.

Breach of Fiduciary Duty

The second cause of action alleges that "[t]he merger of Garden City with PVP was a self-interested transaction" and that the Board Defendants breached their fiduciary duty by pursuing it to further the personal financial interests at the expense of plaintiffs. The claim must be dismissed. The Board cannot be held liable for merely approving the merger, which was in turn

approved by the courts. Furthermore, in their papers plaintiffs repeatedly emphasize that they are not challenging the merger, but only the alleged failure to abide by its terms. As discussed above, the Board no longer existed at the time the alleged wrongdoing occurred.

Fraud/Constructive Trust/Unjust Enrichment

In the third cause of action for fraud, plaintiffs allege that defendants made various misrepresentations and omissions concerning the consideration to be paid at the meeting of the Garden City Board to approve the Merger and during the Bankruptcy Court hearing. Specifically, plaintiffs contend that defendant Sabella stated at the board meeting that "[t]here is no hold back of escrow or provision of any kind for [sic] funds being called back for consideration of being reduced" and that at the court hearing, Sabella and Prism represented that approximately $44 million would be distributed to the shareholders "without holdback or contingency." The complaint also states that Sabella failed to disclose that the form of merger agreement submitted into evidence at the hearing no longer required a release of claim, as did the version previously submitted to the court for approval.

The fraud claim is dismissed. First, plaintiffs cannot assert that they reasonably relied on the alleged

misrepresentations when the express written terms of the Merger Agreement covered the same subject matter (see, Naturopathic Labs. Int'l Inc. v SSL Americas, 18 AD3d 404 [1st Dept 2005]). Second, documentary evidence submitted by defendants establishes that plaintiffs were fully aware of the actual terms of the agreement, including the requirement of an assignment. Finally, the fraud claim is insufficient because it alleges nothing more than that defendants did not intend to perform the terms of the Merger Agreement, and thus duplicates the claim for its breach (see, Rivas v Amerimed USA, Inc., 34 AD2d 250 [1st Dept 2006]). The fourth and fifth causes of action for a constructive trust and unjust enrichment are similarly barred, since the Merger Agreement covers the same subject matter (see, Clark-Fitzpatrick Inc. v Long Island Railroad Co., 70 NY2d 382 [1970]).

Breach of 1963 Agreement

The sixth cause of action alleges that the shareholder defendants breached a 1963 Shareholders' Agreement by agreeing to sell their shares to Prism and PVP before the merger. Collateral estoppel bars this claim. Section 5.1(c) of the Merger Order, which was approved by the Bankruptcy Court after an evidentiary hearing, states that there is "no agreement to which the Corporation is a party" which would be breached by the Merger Agreement. In the Merger Order, the court approved the contracts

of sale, holding that the Trustee, Garden City and Prism were "authorized to take all actions necessary to consummate" the stock purchase agreements and the Merger.

Furthermore, in objecting to the Merger Order, Philip Kassover argued that the Merger would breach the 1976 Shareholders Agreement. That argument was rejected. Plaintiffs could have, but did not, invoke the 1963 agreement at that time. Having failed to do so, they are precluded from raising it as an objection to the Merger here.

Breach of the Merger Agreement/Related Claims

The eighth cause of action alleges that defendant Gibson breached her duties as disbursing agent under the Merger Agreement by failing to pay plaintiffs $2,000 per share for their Garden City stock. As discussed above in connection with the BCL § 501(c) claim, that failure states a cognizable cause of action. Once again, defendants' contention that a lesser amount was owed due to plaintiffs' outstanding monetary obligations merely creates a question of fact.

The seventh and ninth causes of action -- which allege that Gibson's conduct breached her fiduciary duties, and that various defendants aided and abetting that breach -- must be dismissed. The fiduciary duty claim alleges merely that Gibson failed to perform her express duties under the Merger Agreement, without

identifying any obligations independent or extraneous to the contract (see, Savage Records Group v Jones, 247 AD2d 274 [1st Dept 1998]). The deficiency of the claim requires the dismissal of the related aiding and abetting cause of action (see, WIT Holding Co. v Klein, 282 AD2d 527 [2d Dept 2001]).

The tenth cause of action conclusorily alleges that defendants Prism, PVP, Garden City and Sabella interfered with Gibson's performance of her obligations under the Merger Agreement. The claim for tortious interference cannot stand because those parties are not strangers to the contract and plaintiffs have not sufficiently alleged malice (see, Felsen v Sol Café Mfg. Corp., 24 NY2d 682 [1969]; Ultramar Energy Ltd. v Chase Manhattan Bank, N.A., 179 AD2d 592 [1st Dept 1992]; Koret, Inc. v Christian Dior, S.A., 161 AD2d 156 [1st Dept 1990]).

Injunctive Relief

Plaintiffs do not meaningfully defend the eleventh cause of action for a preliminary (or permanent) injunction compelling Garden City to continue operations beyond the three-year period specified in the Merger Agreement. In any event, that period expired in August 2005, shortly after the commencement of this action.

Enforcement of Judgments, Awards and Claims

The twelfth cause of action alleges that Garden City has failed to satisfy judgments, claims and unconfirmed arbitration awards in favor of plaintiffs. The complaint, however, does not identify a single claim. In a footnote to their opposition brief, plaintiffs claim that they "believe" there are outstanding judgments and arbitration awards, and identify two cases in which they believe judgments have been entered. In response, defendants assert that they have received legal advice that the judgments and awards may be unenforceable, untimely or irregular.

The claim is dismissed. CPLR 3013 requires that "[s]tatements in a pleading shall be sufficient to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense." The vague reference to "claims" does not provide defendants with sufficient notice of the wrongs with which they are charged. Furthermore, to the extent that the judgments can be identified, their enforcement is more appropriately pursued through special proceedings under CPLR article 52 than in a plenary action (see, O'Brien-Kreitzberg & Assocs. v K.P. Inc., 218 AD2d 76 [1st Dept 1995]). Similarly, plaintiffs may pursue whatever rights they

have under the alleged arbitration awards in an appropriate proceeding pursuant to CPLR article 75.

Accordingly, it is

ORDERED, that the motion to dismiss is granted as to the second through seventh and ninth through twelfth causes of action, and it is further

ORDERED, that the motion to dismiss is granted as to that part of the first cause of action that seeks recovery of the Assignment Consideration and is asserted against defendants Rosalie Erickson, Lulu Kassover and Richard Baime, but is otherwise denied, and it is further

ORDERED, that the motion is denied as to the eighth cause of action, and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly, and it is further

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ORDERED, that the remainder of the action shall continue and parties are directed to appear for a preliminary conference on January 23, 2007, in Courtroom 208 at 9:30 a.m.

Dated: January 19, 2007

ENTER:

Helen E. Freedman, J.S.C.