

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

VERNON-SUTTON, INC.,

Plaintiff,

Index No.: 21105/06

- against -

Motion Date: 2/21/07

LINDA CONFORTI-BROWN and MARTA
CONFORTI,

Motion No.: 40

Motion Seq. No. 1

Defendants.

- - - - - x

The following papers numbered 1 to 10 on this motion:

	<u>Papers Numbered</u>
Defendants' Notice-Motion-Affirmation- Affidavit(s)-Service-Exhibits & Memorandum of Law	1-5
Plaintiff's Affirmation in Opposition- Affidavit(s)-Exhibits-& Memorandum of Law	6-10

On April 23, 2007, this Court issued a short form order, directing that a hearing be held in response to defendants' motion for summary judgment and dismissal of the complaint.

The parties appeared before the Court on numerous occasions thereafter for conferences without going forward with the hearing.

Ultimately, the parties requested that the Court consider the previously submitted motion and opposition papers and render a decision thereon. The Court consents to said request. The following decision, therefore, is based on defendants' previously submitted motion for summary judgment and dismissal and plaintiff's opposition thereto.

Plaintiff is a family owned, closely held corporation formed in September of 1960. The shares are held equally by two families, the Confortis and the Bratones. Fifty percent of the shares are

held by Linda Conforti-Brown and Martha Conforti (25 percent each) and 50 percent by Arthur Bratone, Ronald Bratone and Steven Bratone (16 2/3 percent each).

The only asset owned by plaintiff corporation, is a commercial building space located at 30-55 Vernon Boulevard.

The property, which plaintiff maintains consists of approximately 37,000 square feet (27,000 square feet of commercial building space and 10,000 square feet of parking space) was transferred by deed from Ray Conforti (defendant's father), to plaintiff corporation in September 1971. The deed, which of course lists the subject lots, namely 14, 24, 25 and 26, also contains metes and bounds descriptions which resulted in the transfer of only a portion of lot 14. The result is that approximately 6,000 square feet of lot 14 is titled in the names of defendants Martha Conforti and Linda Conforti-Brown, only as individuals since the passing of their parents.

The underlying action brought by Arthur Bratone as president of plaintiff corporation seeks to "reform" the 36 year old deed transfer from Ray Conforti to plaintiff to include the approximately 6,000 square feet not currently included; and/or to declare that plaintiff corporation is entitled to the subject property by virtue of adverse possession.

Defendants, by motion for summary judgment, seek dismissal of plaintiff's action on the grounds that plaintiff's cause of action, brought by Arthur Bratone, was initiated without corporate authority. Defendants maintain that contrary to plaintiff's contention, Arthur Bratone is not the president of the corporation since there has been no directors meeting or election since the death of Ray Conforti in 1993. Moreover, defendants argue that even if Arthur Bratone is president of the corporation, he lacks the authority to act on its behalf.

It is well settled that "[a]bsent a provision in the certificate of incorporation or by-laws or action by the board of directors (emphasis added), prohibiting the president from instituting suit in the name and on behalf of the corporation (see Not-For-Profit Corporation Law §292[a][2]) the president must be deemed, in the discharge of his duties, to have authority to do so. See West View Hills v. Lizau Realty Corp., 6 NY2d 344, 348 (1959); Rothman and Schneider v. Beckerman, 2 NY2d 493, 497 (1957); Joseph Polchinski Co. v. Cemetery Floral Co., 79 AD2d 648 (1980); see also Fisher v. Maloney, 43 NY2d 553, 557 (1978); Matter of Paloma Frocks (Shamokin Sportswear Corp.), 3 NY2d 572 (1958); compare Sterling Indus v. Ball Bearing Pen Corp., 298 NY 483 (1949)." Polish

American Media Inc. v. Jozwiak, 29 AD3d 663, 664 (2d Dep't 2006).

"It has [also] consistently been held that the statutory rule, that the business of a corporation shall be managed by its board of directors (Business Corporation Law § 701) shall not be circumvented. Sterling Indus. v. Ball Bearing Pen Corp., 298 NY 483; see Matter of Paloma Frocks (Shamokin Sportswear Corp.), 3 NY2d 572, 575; Kent & Co. v. Wolf, 143 AD2d 813, 814)." Executive Leasing v. Leder, 191 AD2d 199, 200 (1st Dep't 1993).

"However, where there are only two stockholders each with a 50 percent share, an action can not be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs; the proper remedy is a stockholder's derivative action. (Abelow v. Grossman, 91 AD2d 553, 554; Tidy-House Paper Corp. of N.Y. v. Adlman, 4 AD2d 619)." Id.

Plaintiff's argument, that there are more than two shareholders flies in the face of common sense and reason. It is apparent that the two families that are at odds with one another, are holders of equal total shares of the corporate stocks, and would in all events cancel each other out in a vote for authorization to bring such an action.

"...[I]t could hardly be expected [therefore] that if approval of the board of directors were sought [the Confortis] who [control] 50 percent of the board, would have authorized the action against [themselves]." Tidy-House Paper Corp. of N.Y. v. Adlman, 4 AD2d 619, 621 (1st Dep't 1957).

Thus, to allow Arthur Bratone as president, to bring the underlying action, would be "...in effect to hold that the affairs of the corporation shall be managed by its board of directors, except in the case of a deadlock when it shall be managed by any director who happens to be president." Id.

Thus, Bratone's presumptive authority to bring this action as president of the corporation, assuming for the moment that he is president of the corporation, does not apply in this circumstance where the Confortis have equal control to disapprove of the action. L.W. Kent and Co. v. Wolf, 143 AD2d 813, 814 (2d Dep't 1988).

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that defendants' motion for summary judgment is granted; and, it is further

ORDERED, that the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: Jamaica, New York
September 6, 2007

JOSEPH P. DORSA
J.S.C.