New York Official Reports

Unreported Disposition
24 Misc.3d 1224(A), 897 N.Y.S.2d 670 (Table), 2009 WL 2195787 (N.Y.Sup.), 2009 N.Y. Slip Op. 51605(U)

***1** Sanford B. Miot, Plaintiff,

v.

Harriet Miot, in her individual capacity and as an officer of Madcat Realty Corp., and ARNOLD MIOT, in his individual capacity and as an officer of Madcat Realty Corp., Defendants.

603384/06
Supreme Court, New York County
Decided on July 15, 2009

CITE TITLE AS: Miot v Miot

ABSTRACT

Corporations
Dissolution

Corporations
Shareholders' Derivative Action

Miot v Miot, 2009 NY Slip Op 51605(U). Corporations—Dissolution. Corporations—Shareholders' Derivative Action. (Sup Ct, NY County, July 15, 2009, Fried, J.)

APPEARANCES OF COUNSEL

For Plaintiff:
Kenneth J. Kelly, Esq.
Donna Marie Werner, Esq.
Epstein Becker & Green, P.C.
250 Park Avenue
New York, New York 10177

For Defendants:
Michael J. Berman, Esq.
Michael J. Berman & Associates, P.C.
15 Maiden Lane, 11th floor
New York, NY 10038

OPINION OF THE COURT

Bernard J. Fried, J.

In this action, Sanford Miot ("Plaintiff" or "Sanford") asserts a cause of action for misappropriation of corporate funds against Harriet Miot, his sister-in-law ("Defendant" or "Harriet") and Arnold Miot, his nephew ("Arnold"). The claim arises from a stock certificate issued to Sanford in 1985 for 140 shares of Madcat Realty Corporation, which was incorporated in the 1970s. Primarily at issue is whether those shares entitled him to a portion of proceeds from a 2005 sale of property made on behalf of a Madcat Realty Corporation, which was incorporated in 1986.

On January 27 and 28, 2009, I held a non-jury trial during which the following witnesses ***2** testified: Sanford; Harriet; Jack Glasser, Esq., Alvin's former attorney; Robert Wilder, Harriet's accountant; and, Arnold. After the trial, Plaintiff withdrew his claim against Arnold. (Plaintiff's Post Trial Brief, dated March 12, 2009, at 1.) Summations were heard on May 5, 2009. I make the following findings of fact and conclusions of law based on those proceedings.

Findings of Fact

Sanford is the late Alvin Miot's ("Alvin") brother. Harriet is Alvin's widow and Arnold is their son. Prior to Alvin's death, family relations were amicable and remained so until shortly before this litigation began. (Tr.[1] 238-39.)

In the 1970s, Harriet acquired shares of Madcat Realty Corporation ("Madcat I").[2] (Ex. 26.) Madcat I owned and managed 251 Kane Street, Brooklyn, NY ("Brooklyn Property") through the 1970s into the 1980s. (*See* Ex. H.) Sanford received a stock certificate, dated March 25, 1985, for 140 shares of Madcat I, which represented a 70 percent interest in the corporation since only 200 shares were outstanding. (*See* Ex. 42.) Alvin never gave Sanford a reason for giving him such a significant portion of Madcat I and Sanford never asked for one. (Tr. 24-25, 40.) Although Sanford had previously lent Alvin $500,000 and had yet to receive any payment for the loan at the time he received

the certificate,[3] the parties agree that the shares were a gift given for reasons known only to Alvin--not as any collateral for the loan. (*See* Plaintiff's Proposed Findings of Fact and Conclusions of Law ["Plaintiff's Proposed Findings"], dated March 12, 2009, ¶ 7; Defendants' Proposed Findings of Fact and Conclusions of Law ["Defendants' Proposed Findings"], dated April 10, 2009, ¶ 13-14.)

The certificate was signed by both Alvin, as President of Madcat I, and Harriet, as Secretary-Treasurer. (Ex. 42; Tr. 56.) The valid certificate gave Sanford 70 percent ownership of Madcat I. Harriet owned the other 30 percent. (*See* Ex. 26.) No one ever advised Sanford that the certificate had been cancelled or removed, nor did he ever transfer the certificate to anyone else. (Tr. 25-26.)

Despite the fact that Sanford was the majority shareholder in Madcat I, Alvin maintained sole control over the corporation. Neither Harriet, nor Sanford knew of any board meetings or shareholders' meetings. (Tr. 38-39, 251, 253.) Though Sanford was an experienced shareholder, (*Id.* at 38), he did not exercise any of his rights as shareholder, nor have any interest in the corporation. (*Id.* at 26, 38-39.) He did not even know if Madcat had any valuable assets. (*Id.* at 39.) Harriet did not exercise any of her rights as shareholder either. She did not vote, examine corporate records or tax returns, nor "take any interest in the corporation at all." (*Id.* at 58-59.) However, Harriet did function minimally in her capacity as an officer of Madcat I by signing documents although she did not ask questions about, or pay attention to, the documents she signed. (*Id.* at 58.) Harriet was an officer and shareholder in Madcat I by name only--she maintained no control over, nor had any ***3** knowledge of, the business affairs of the corporation.

Furthermore, only one corporate book, a blank stockbook, was located for "Madcat Realty Corporation." (*Id.* at 73.) It is unclear whether any other corporate books or records exist now or, for that matter, ever existed. (*Id.* at 70.) Therefore, the details regarding the business of Madcat I are derived primarily from the testimony of Mr. Glasser--the only witness with personal knowledge of the business affairs of Alvin's corporations. Mr. Glasser, a member of the New York bar, represented both Alvin and his corporations, including Madcat Realty Corp., through the 1980s and early 1990s. (*Id.* at 122-24, 147-48.)

The parties agree that Madcat I was dissolved by proclamation of the New York Secretary of State in the 1980s, though it is unclear precisely when this happened. (Plaintiff's Proposed Findings, at ¶ 17; Defendants' Proposed Findings, at ¶ 9.) Because the validity of the stock certificate was not contested, the inference must be made that the dissolution occurred after March 25, 1985. (*See* Ex. 42.) Furthermore, the New York Secretary of State may not certify two corporations with the same name at any given time. Tax Law § 203-a(6). A corporate name that was dissolved may be reused after a 3-month period. Tax Law § 203-a(6). Based on the Secretary's certification of Madcat Realty Corporation in 1986 ("Madcat II"), discussed *infra*, Madcat I must have been dissolved between March 26, 1985 and December 25, 1985.

Madcat I was dissolved for failure to pay franchise taxes. (Tr. 198.) Though reinstatement was possible, *see* Tax Law 203-a(7); (Tr. 198), Mr. Glasser noted that he never advised any client to do so, nor did Alvin ever mention this solution to Mr. Glasser. (*Id.* at 199.) Mr. Glasser never filed any franchise taxes on behalf of any of Alvin's corporations, specifically not for Madcat I. (*Id.* at 145-46.) There is no evidence that Alvin ever paid the back taxes to reinstate Madcat I. Though dissolved and not reinstated, Madcat I continued to collect rents and pay real estate taxes on the Brooklyn Property until it was sold in 1987, discussed *infra*. (*Id.* at 200.)

On February 21, 1986, Alvin Miot filed a certificate of incorporation for Madcat II. (Ex. 27A.) As with Madcat I, neither Harriet, nor Sanford was involved with or had any knowledge of the business affairs of Madcat II prior to Alvin's death. (Tr. 26-27, 66.) Harriet did, however, admit that she owned shares of Madcat II. (*Id.* at 227.) Mr. Glasser was not involved in the 1986 incorporation of Madcat II, nor its subsequent purchase of property. (*Id.* at 147, 166.)

On May 19, 1986, Madcat II acquired the property located at 400A East 118th Street, New York, NY ("Manhattan Property") from Almark Construction Corporation, another one of Alvin's corporations.[4] (Ex. 28.) The closing statement listed the business location of Madcat II as 251 Kane Street, (*id.*), which was the same property owned by Madcat I. (*See* Ex. H.) Thus, at the time of purchase of the Manhattan Property, Madcat II continued to be associated with the Brooklyn Property, even though there was never an official transfer of the property from Madcat I to Madcat II. (Tr. 142, 182.)

Mr. Glasser believed that there was no transfer of the Brooklyn Property because "it was always the same corporation." (Tr. 182.) Upon first examining the closing statement from the Manhattan Property purchase, Mr. Glasser

believed that the Manhattan Property was purchased by the same corporation that owned the Brooklyn Property. (*Id.* at 159.) And to a reasonable observer, ***4** Madcat I and Madcat II were the same corporation. The Manhattan Property was a commercial building with one or two lofts upstairs. (*Id.* at 193.) The business of Madcat II entailed leasing and maintaining these units. (*Id.* at 302-03.) Similarly, prior to its dissolution and after, the business of Madcat I entailed leasing and maintaining the units of the Brooklyn Property. (*See id.* at 141-42.) Alvin maintained sole control over both properties simultaneously.

In August 1987, Alvin sold the Brooklyn Property on behalf of "Madcat Realty Corp."[5] (Ex. H.) On the closing statement, there is no way to distinguish "which" Madcat sold the property. (*See id.*) To ensure marketability of title, the title company required the corporation to put money in escrow to cover any outstanding franchise taxes. (Tr. 204-05, 208.) Because Madcat Realty Corp., in both formations, was a sub-chapter S-corporation, profits and losses should have passed directly to the shareholder(s), (*id.* at 269.), but Sanford did not receive any proceeds from the sale. (*See id.* at 21-23, 43.) This transaction, and the subsequent distribution of profits are not at issue in this litigation.

Madcat II continued to own and manage the Manhattan Property under Alvin's direction through the 1990s. However, Alvin's health began to fail around 1997 or 1998 so Arnold became involved in the management of the Manhattan Property. (Tr. 283.) Arnold assisted his father by collecting rents and performing routine maintenance. (*Id.* at 283-84.) He took over total maintenance and care of the building in 1999 or 2000. (*Id.* at 285.) Shortly after in 2001, Alvin passed away, (*id.* at 19, 60, 295.), and Harriet took over Madcat II. (*Id.* at 62-63.) At the time, the only known asset of Madcat II was the Manhattan property, (*Id.* at 62), which Arnold continued to take care of and manage for his mother. (*Id.* at 62-63.) Though Arnold assisted both his mother and father as a building manager, he never served as an officer or director of either Madcat, nor did he receive any compensation for his services. (*Id.* at 305.)

Some time after her husband's death, a broker approached Harriet and her son about purchasing the Manhattan Property. (Tr. 298.) In preparation for sale, the three leases attached to the Manhattan Property were bought out. (Ex. 21; Tr. 303). After the building was emptied, 402-406 East 118th Street Associates, LLC ("East 118th Street Associates") purchased the Manhattan Property on November 9, 2005 for a purchase price of $1.2 million. (Tr. 34; Ex. 11.) East 118th Street Associates made out all checks to Madcat Realty Corporation, (Ex. 12, Ex. 13, Ex. 14; Tr. 231), which were initially deposited into a Madcat checking account. (Tr. 100.) Defendant conceded that the total checks received by Madcat totaled around $1.1 million. (*Id.* at 109-10.) Less legal ***5** fees,[6] state taxes and fees,[7] and broker's commission,[8] Madcat received $1,103,870 from the sale of the Manhattan Property. (Ex. 11.)

The closing statement listed Harriet as President of Madcat Realty Corp., (Ex. 11), and she signed all necessary documents as President of Madcat Realty Corp. (Ex. 5; Ex. 6; Ex. 8.) Eventually, Harriet deposited proceeds from the sale into her personal checking account. (Ex. 17; Tr. 103, 105.) Although Harriet's 2005 tax return showed a capital gain from the sale of only $898, 157, (Ex. 2), Mr. Wilder, who prepared the document, acknowledged that the amount reflected on Harriet's tax return did not change the total proceeds Madcat received from the sale. (Tr. 267.) Sanford did not receive any proceeds from the sale, nor did Harriet inform him of the sale. (*Id.* at 120.) He first learned of it through the course of separate litigation in Florida in 2006. (*Id.* at 29.)

Conclusions of Law

Misappropriation Claim

Plaintiff alleges that Defendant misappropriated corporate funds by distributing the proceeds from the sale of the Manhattan Property to herself without distributing any funds to him. (Compl. ¶ 34.) Plaintiff argues that his shares in Madcat I entitle him to proceeds from the sale of the Manhattan Property because Madcat II was a mere continuation of Madcat I. (*See* Plaintiff's Proposed Findings, at 7-9.) Plaintiff further argues that Harriet should be estopped from asserting that the Madcats are distinct and separate entities because Madcat II was incorporated only to avoid paying franchise taxes on Madcat I. (*See* Plaintiff's Proposed Findings, at 7-9.) Defendant asserts that Madcat I and Madcat II are distinct and separate entities and that the interest Sanford had in Madcat I ended when the corporation "wound up" its affairs with the sale of the Brooklyn Property. (*See* Defendants' Proposed Findings, at 5-7.)

Under Tax Law 203-a, the New York Secretary of State may dissolve a corporation that fails to pay franchise taxes. The dissolved corporation can be reinstated *nunc pro tunc* upon payment in full of the outstanding franchise taxes.

Tax Law 203-a (7). Generally, if the corporation continues to conduct business after dissolution, it does not get the benefit of *de facto* status, but the corporation may continue to operate for the sole purpose of winding up its affairs. *Metered Appliances, Inc. v. 75 Owners Corp.*, 225 AD2d 338, 338 (1st Dept. 1996); *Lorisa Capital Corp. v. Gallo*, 119 AD2d 99, 109, 110-11 (2d Dept. 1986) (citations omitted). However, parties who knowingly treat a dissolved entity as a corporation are estopped from asserting its nonexistence to avoid obligations made with and under the now dissolved corporation. *See e.g.*, *Metered Appliances*, 225 AD2d at 338; *National Bank of North America v. Paskow*, 75 AD2d 568, 568 (1st Dept. 1980).

A dissolved corporation that continues to conduct its regular course of business may not ***6** avoid paying franchise taxes by reincorporating. *Lorisa*, 119 AD2d at 110; *D & W Central Alarm Co. v. Copy Masters, Inc.*, 122 Misc 2d 453, 457 (Civ.Ct. Queens Co. 1983). If the court were to allow a dissolved corporation to avoid its preproclamation indebtedness by simply reincorporating, the court would undermine the franchise tax statutory scheme that encourages corporations to pay franchise taxes in order to be reinstated. *See D & W*, 122 Misc 2d at 457. The statutory scheme would be similarly undermined if the court allowed a corporation to avoid its obligations to its shareholders through its dissolution for failure to pay franchise taxes.

In *D & W*, the court decided a case remarkably similar to the situation at hand. 122 Misc 2d at 453-54. In that case, the defendant was dissolved by proclamation for failure to pay franchise taxes; however, business continued as usual since apparently no one was aware of the lapse in corporate status. *Id.* at 454. Eventually realizing the dissolution, the defendants filed a new certificate of incorporation rather than paying the franchise taxes due and owing to the state. *Id.* The defendants then tried to assert the nonexistence of the corporation as grounds to dismiss the suit of a creditor against them. *Id.* at 453. Just like Defendant in this case, they argued that the obligations of the first entity did not carry over to the newly incorporated entity, even though it shared the same name, officers, business, location, etc. *Id.* Rejecting this argument, the court noted that allowing a dissolved corporation to avoid its obligations this way essentially created a loophole for the delinquent corporation to benefit from its wrongdoing--intentional or otherwise. *Id.* at 457.

If Madcat II was a "mere continuation" of Madcat I, Harriet would be estopped from asserting that these were separate and distinct corporations. Although the court in *D & W* did not specifically refer to the mere continuation doctrine, each corporation shared the same creditors, debtors, officers, shareholders, location and business purpose so the court could properly infer that the reincorporation allowed the dissolved corporation to continue its business under the same name without paying franchise taxes. *Id.* at 454. Generally, when a successor corporation is in essence a reorganization of a now extinguished predecessor, the successor may be considered a "mere continuation" of its predecessor and liable for its predecessor's obligations. *See Schumacher v. Richards Shear Co.*, 59 NY2d 239, 245 (1983); *Chicago Title Ins. Co. V. Alday-Donalson Title Co. Of Fla., Inc.*, 832 So.2d 810, 815 (Fla. Dist. Ct. App. 2002) (noting that the key to the mere continuation doctrine "is a change in form, but not in substance"). Although no one factor is dispositive, other courts have considered certain factors as evidence tending to show that a successor corporation was a mere continuation of its predecessor: (1) all or substantially all assets are transferred to the successor corporation, (2) only one corporation exists after the transfer, (3) assumption of an identical or nearly identical name, (4) retention of the same corporate officers and\or directors, and (5) continuation of the same business. *See Burgos v. Pulse Combustion, Inc.*, 227 AD2d 295, 295-96 (1st Dept. 1996); *See also, Jackson v. Diamond T. Trucking Co.*, 241 A.2d 471, 477 (N.J. Super. Ct. Law. Div. 1968).

As to the first two factors, Defendant argues that since there was no transfer of assets from one Madcat to the other, the mere continuation doctrine must necessarily fail. None of the cases cited by either party, however, stands for an absolute test where each factor must be present to find that one entity is a mere continuation of the other. *See, e.g.*, *Burgos*, 227 AD2d 295; *Jackson*, 241 A.2d 471. More importantly, Alvin's disregard of corporate formalities by not transferring the assets of Madcat I to Madcat II does not change the fact that Alvin continued the business of Madcat I through the incorporation of Madcat II. Furthermore, as a practical matter, though there was no ***7** transfer, only one corporation existed after the dissolution and reincorporation of Madcat. Alvin was the only one benefitting from the assets of both Madcats, and to any outsider, there appeared to be only one Madcat entity.

Moreover, the last three factors weigh heavily in favor of finding that Madcat II was a mere continuation of Madcat I. First, each corporation had an identical name.[9] Second, Alvin was the President of both corporations and the only

officer making any decisions for either corporation. And lastly, Madcat I and Madcat II were engaged in substantially the same business. Both corporations owned, managed, and collected rents from properties in New York City. Under these circumstances, I conclude that Madcat II was a mere continuation of Madcat I despite the fact that there was no formal transfer of assets.

Defendant also claims that the sale of the Brooklyn Property constituted a "winding up" of Madcat I's corporate affairs and thus, Madcat II was a distinct and separate entity from Madcat I. (Defendants' Proposed Findings, at ¶ 51-52.) The sale of corporate assets may properly be considered part of a "winding up" of corporate affairs, BCL § 1005 (a)(2); however, here, the sale occurred after a new corporation had already been formed under the same name, by the same person, with the same officers. Alvin controlled both corporations simultaneously, which engaged in the same business, and even used the Brooklyn Property--belonging to Madcat I--as the place of business for Madcat II when the Manhattan Property was purchased. Thus, it is evident Madcat II was not a distinct and separate entity from Madcat I since Alvin treated the two corporations as one before any "winding up" of the dissolved Madcat occurred.

Defendant asserts that the new Madcat was incorporated to avoid giving Plaintiff an interest in the Manhattan Property. (Defendants' Post Trial Brief, dated April 10, 2009, 4-5.) Alvin passed away before this litigation and there was no direct evidence as to his state of mind in incorporating Madcat II. However, Defendant argues that Alvin's intent can be inferred from the evidence that Alvin could not purchase the Manhattan Property under Madcat I because of the outstanding taxes and that he incorporated a new entity to purchase the Manhattan Property, instead of reincorporating Madcat I by simply paying the taxes. In any event, Alvin's intentions are irrelevant. Indeed in *D & W*, the court found that the lapse in paying franchise taxes was accidental and caused by poor accounting--not done with any specific intention to avoid franchise tax liability or any other corporate indebtedness--but this did not save the defendant from liability since the corporation would benefit from its wrongdoing regardless of intentions. *See* 122 Misc 2d at 454. Madcat I avoided paying franchise taxes to the state and continued to do business under the same name through the incorporation of Madcat II regardless of Alvin's reasons for incorporating Madcat II. To ***8** allow Defendant to successfully claim that these were distinct and separate entities would allow her to benefit from Alvin's efforts to avoid the franchise tax system. Since the incorporation of Madcat II allowed Alvin to carry on the business of the dissolved Madcat I without having to pay franchise taxes, Harriet should be, and is, estopped from claiming that there were two Madcats to avoid liability to Madcat I's only other shareholder.

Having concluded that Madcat II was a mere continuation of Madcat I and that Harriet is estopped from asserting her only defense that these were separate corporations, Plaintiff has established that Harriet misappropriated corporate funds by not dispersing any of the Manhattan Property sale proceeds to him.

Shareholder's Derivative Suit

Defendant also argues that the action should be dismissed because it was improperly brought in Sanford's individual capacity instead of as a shareholder's derivative suit. (*See* Defendants' Proposed Findings, at 7-8.) Defendant characterizes the argument as a failure to state a cause of action. (Summ.[10] 16) Plaintiff responds that this argument was procedurally barred since a challenge to who should have brought the suit goes to capacity, (Summ. 18, 21), but that in any event, Plaintiff was entitled to bring the suit in his individual capacity because he and Harriet were the only shareholders and the corporation has been dissolved for over 20 years. (Summ. 10-11.) I do not need to determine whether Defendant waived this argument by failing to raise the derivative suit issue earlier because her argument fails on the merits.

Generally, a shareholder has no individual cause of action for claims that allege wrongs against the corporation. *Abrams v. Donati*, 66 NY2d 951, 953 (1985). "[D]iversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." *Id.* This rule typically applies with equal force to shareholders of closely held corporations, *see e.g.*, *Glenn v. Hoteltron Sys.*, 74 NY2d 386, 392 (1989); *Wolf v. Rand*, 258 AD2d 401, 403 (1st Dept. 1998). In *Glenn v. Hoteltron Sys.*, cited by Defendant,[11] the Court of Appeals redirected damages awarded to an individual shareholder of a close corporation for a diverted corporate opportunity claim back to the corporation itself even though the wrongdoer would then share in the restitution. *Id. Glenn*, however, is distinguishable. The Court stated that its decision to require damages to revert to the corporation was based on the rights of creditors, who

while not parties, might have had claims superior to the innocent shareholder. *Id.*; *see also Wolf*, 258 A.D. at 403. The Court noted, however, that other ***9** circumstances may justify awarding relief directly to the innocent shareholder(s). *Glenn*, 74 NY2d at 392.

Moreover, although a shareholder of a dissolved corporation has the capacity to sue derivatively even years after the corporation's dissolution, *Independent Investor Protective League v. Time, Inc.*, 50 NY2d 259 (1980); *Corcoran v. Corcoran*, 192 AD2d 503 (2d Dept. 1993), the court may use its equitable powers to "dispense with the presence of [the] defunct corporation" if the shareholder "is in reality the only one injured." *Geltman v. Levy*, 11 AD2d 411, 413 (1st Dept. 1960) (quoting *Weinert v. Kinkel*, 296 NY 151, 152, 153 (1947) and *Di Tommasso v. Loverro*, 250 A.D. 206 (2d Dept. 1937), *aff'd* 276 NY 551 (1937)); *see also First Nat. Bank of Maryland v. Fancy*, 268 AD2d 229, 229 (1st Dept. 2000) (affirming the trial court's decision to award direct payment to the plaintiff, instead of the defunct corporation, to "prevent[] unnecessary circuity and hardship"). In *Geltman v. Levy*, stockholders of a liquidated corporation brought a suit against a third party for breach of fiduciary duty. 11 AD2d at 412. Though the Appellate Division ultimately held that the claim, as brought, was not derivative in nature, the Court explained that assuming the claim had been derivative in nature, dismissal would not have been appropriate. *Id.* at 413. As the Court explained, insisting on a derivative suit where the plaintiffs were the only injured parties by the wrongdoing of the defendants would "encourage circuity and [] compel them to follow a meaningless legal procedure in complete disregard of the realities of the situation." *Id.* at 414.

This case presents circumstances that justify awarding relief directly to the shareholder. There are no creditors, nor anyone else entitled to , or who claims, the proceeds of this sale. As a sub-chapter S-corporation, all profits, which would include proceeds from a sale of the corporation's only asset, were supposed to pass directly to the shareholders--here only Harriet and Sanford. Thus, the misappropriation of funds, while technically a misappropriation of corporate funds and thus, an injury to the corporation, injured no one but Plaintiff. Moreover, the reality is that Madcat I was dissolved over 20 years ago and its successor, Madcat II, sold its only asset. As in *Geltman* and *First National*, dismissing this claim where only Plaintiff and Defendant have any interest in the long-ago dissolved corporation would ignore the "realities" of the case and encourage "circuity." If the case were required to be brought derivatively on behalf of Madcat, the outcome would be exactly the same. As such, I reject Defendants' argument that the case be dismissed because it was not brought derivatively.

Conclusion

Plaintiff has proven his cause of action for misappropriation of corporate funds. By the misappropriation of funds, Harriet caused Sanford to suffer damages in the amount of $765, 709, which represents 70% of the net proceeds of the Manhattan Property.[12] Sanford is awarded $765,709 ***10** plus prejudgment interest.

The CPLR provides that prejudgment interest "shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with . . . possession or enjoyment of[] property. . . ." CPLR § 5001 (a). Causes of action such as fraud, breach of fiduciary duty, conversion and unjust enrichment qualify for the recovery of prejudgment interest under this section. *See Gibbs v. Breed, Abbott & Morgan*, 181 Misc 2d 346, 354 (Sup.Ct 1999) *reversed on other grounds* 279 AD2d 887 (1st Dept. 2001); *Flamm v. Noble*, 296 NY 262, 268 (1947); *Eighteen Holding Corp. v. Drizin*, 268 AD2d 371, 372 (1st Dept. 2000). Prejudgment interest shall run "from the earliest ascertainable date the cause of action existed." CPLR § 5001 [b].

With regard to the damages caused to Sanford from Harriet's misappropriation of the funds from the Manhattan Property, November 21, 2005 was the earliest ascertainable date when Plaintiffs cause of action existed since Harriet admits to, and her bank statements show, the transfer of funds from the Madcat checking account to her personal account on that date. (Ex. 17.)

Accordingly, it is

ORDERED that the Clerk shall enter judgment in favor of Plaintiff, Sanford Miot, against Defendant, Harriet Miot on the third cause of action in the Complaint, alleging misappropriation, in the sum of $765, 709, plus prejudgment interest from November 21, 2005.

Dated:ENTER:

_____

J.S.C.

FOOTNOTES

Footnotes

1 "Tr. __" refers to the trial transcript from January 27 and 29.

2 For ease of reference and clarity, I will, at times, refer to two Madcat Realty Corporations, though this is not evidence that I reject Plaintiff's mere continuation theory.

3 Sanford did receive some repayment of the loan at a later date, (Tr. 23), although that is not relevant to this litigation, since the stock was not collateral for the loan.

4 Alvin owned Almark Construction Corporation jointly with Mark Tasimowicz at the time of the sale. (Tr. 152.)

5 Alvin is listed as appearing on behalf of the sellers, which includes both Madcat Realty Corp. and Harsho Realty Corp. (*See* Ex. H) Alvin signed on behalf of Madcat Realty Corp for 251 Kane Street and on behalf of Harsho for 18 Sidney Place. (*Id.*) This is consistent with Mr. Glasser's testimony that Alvin owned two Brooklyn properties through two separate corporations. (Tr. 124-25, 151.)

6 Legal fees totaled $9,500 and were taken out of the down payment and paid directly to Platte, Klarsfeld, Levine & Lachtman, LLP. (Ex. 11; Ex. 14.)

7 State taxes and fees totaled $37,360 and were paid directly to New York Land Services out of the down payment. (Ex. 11; Ex. 14.)

8 Broker's commission totaled $50,000 and was paid directly to V.I.P. Realty upon closing. (Ex. 11; Ex. 14.)

9 Plaintiff spent significant time at trial on the fact that some documents from Madcat II spelled "Mad Cat" as two words and others as "Madcat" one word. (*E.g.*, Tr. 182, 247, 287.) I need not address the spelling issue for two reasons: first, Defendant did not contend at summations or in her brief that there is any significance to the use of "Mad Cat" on any documents and second, even with a space, the corporate names are "nearly identical," which is close enough to support the mere continuation doctrine.

10 "Summ. __" refers to the transcript from the summations before me on May 5, 2009.

11 Along with *Glenn* and *Wolf*, Defendant cited more recent appellate division and trial court decisions, which require derivative suits for wrongs to closely held corporations. (Defendants' Post Trial Brief, at 13; Summ. 17.) However, these cases are also distinguishable. Neither case dealt with a sub-chapter S-corporation, in which profits pass directly through to shareholders. *See generally Erlich v. Hambrecht*, 19 AD3d 259 (1st Dept. 2005); *Rubenstein v. Rubenstein*, 11 Misc 3d 1062(A) (Sup. Ct. NY County March 13, 2006). Moreover, only *Rubenstein v. Rubenstein*, dealt with a corporation that was already dissolved and in that case, the suit was brought for a wrong that occurred prior to the dissolution. 11 Misc 3d 1062(A).

12 At trial, Plaintiff represented to Defendant (and Defendant conceded) that the proceeds from the sale were a little more than $1.1 million, (Tr. 109-110); however, in his post trial brief, Plaintiff represents that the proceeds from the sale of the Manhattan Property were $1, 093, 870 and that his 70% interest entitles him to $765, 709. (Plaintiff's Post Trial Brief, at 16; Plaintiff's Post Trial Reply Brief, dated April 27, 2009, at 9.) Although Defendant argued against judgment in this case, she did not dispute the amount Plaintiff asserted as the total proceeds from the sale. Therefore, I accept the total proceeds as revised in Plaintiff's brief as the amount he is entitled to recover.