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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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RE-POLY MANUFACTURING CORP., INNA MAKAROBSKAIA, ALEKSANDR KONDRATYEV, SERGEI GOLOUBENKO and YEVGENIY KONOVALOV,

Index No.:17688/09

Plaintiff(s),

Motion Date:12/15/09

- against -

Motion Cal. No.: 18
Motion Seq. No: 1

ANTON DRAGONIDES, CARY CHIN and MAINE SERVICE CORP.,

Defendant(s).

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The following papers numbered 1 to 13 read on this motion by the defendants Anton Dragonides and Maine Service Corp. for an order dismissing the complaint, disqualifying plaintiffs' attorney from representing the plaintiffs and for sanctions.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service	1 - 4
Memorandum of Law In Support	5
Affirmations in Opposition-Affidavit in Opposition-Exhibits-Service	6 - 9
Memorandum of Law in Opposition	10
Reply Affirmation-Exhibits-Service	11- 13

This court hereby modifies its order dated March 1, 2010 and determines defendants' Anton Dragonides' and Maine Service Corp.'s motion for an order dismissing the complaint and seeking sanctions as follows:

This is an action for negligence and breach of fiduciary duty. It is alleged that defendants Anton Dragonides ("Dragonides") and Cary Chin ("Chin") are corporate officers and that plaintiffs Inna Makarobskaia ("Makarobskaia"), Aleksandr Kondratyev ("Kondratyev"), Sergei Goloubenko ("Goloubenko") and Yevginiy Konovalov ("Konovalov") are shareholders of the plaintiff Re-Poly Manufacturing Corp. ("Re-Poly"). On or about September 17, 2008,

defendant Dragonides, plaintiffs Makarobskaia, Kondratyev, Goloubenko and Konovalov executed a corporate Release, Assignment, Covenant Agreement and Purchase Option Agreement, each dated September 17, 2008. Plaintiffs now sue, *inter alia*, for breach of defendant Dragonides' and Chin's obligations under these agreements.

This action was commenced on or about July 1, 2009 by the filing of a summons and complaint. According to the affidavit of service filed with the Queens County Clerk, defendant Dragonides was served with the pleadings, pursuant to CPLR §308 (1) on or about July 8, 2009, defendant Chin was served with the pleadings, pursuant to CPLR §308(2), on August 13, 2009 and defendant Maine Service Corp. ("Maine") was served with the pleadings, pursuant to CPLR §311 and BCL §306, on July 9, 2009. Defendant Chin has not answered the complaint or appeared in this action. By order dated February 11, 2010, this court granted plaintiffs' motion for a default judgment against defendant Chin.

Defendants Dragonides and Maine now move, pursuant to CPLR §3211, for dismissal of the complaint on the grounds that plaintiffs' causes of action are not ripe, that this matter cannot be maintained because of arbitration, that a defense is found upon documentary evidence, that the pleading fails to state a cause of action and that this court has not obtained jurisdiction over the moving defendants due to plaintiff's improper service of the pleadings, for sanctions and for other relief.

That portion of defendants Dragonides' and Maine's motion which seeks an order dismissing the complaint, pursuant to CPLR §3211(a)(8), due to this court's lack of jurisdiction over them, is denied. By order dated March 5, 2010, plaintiffs' motion for leave to file an affidavit reflecting service on defendant Dragonides *nunc pro tunc* to July 28, 2009 was granted. A review of the file maintained by the Queens County Clerk reveals that plaintiffs filed an affidavit reflecting that service on defendant Maine Service Corp. was effectuated, pursuant to CPLR §311, on July 9, 2009, by service on the Secretary of State of the State of New York. Additionally, plaintiffs' affidavit reflecting service on defendant Dragonides states that he was served, pursuant to CPLR §308(2), by personal service. Thus, the plaintiffs have amply demonstrated that this court has acquired jurisdiction over the moving defendants.

Defendants Dragonides and Maine also seek to dismiss the complaint because the causes of action are not ripe and, pursuant to CPLR §3211(a)(7), because the plaintiffs' have failed to state a cause of action. It is well-settled that a motion made pursuant to CPLR §3211(a)(7), can only be granted if, from the pleadings' four corners, factual allegations are not discerned which manifest any cause of action cognizable at law. In

furtherance of this task, the court liberally construes the complaint, accepts as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accords the plaintiff the benefit of every possible favorable inference (*See, 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]).

A review of the instant complaint reveals that plaintiffs' first cause of action seeks relief for defendants Dragonides' and Chin's alleged negligence. The second and third causes of action seek relief for defendants Dragonides' and Chin's alleged breach of fiduciary duty. The fourth cause of action seeks an order directing defendant Dragonides to specifically perform his obligations, pursuant to the Purchase Option Agreement and Assignment Agreement between the parties, to sell his shares of the corporation. The fifth cause of action seeks relief for defendant Maine's alleged breach of the Assignment Agreement and the sixth cause of action seeks dissolution of the Re-Poly Manufacturing Corp.

That portion of the instant motion which seeks dismissal of plaintiffs' fourth and fifth causes of action, because the claims contained within them are not ripe, is granted. New York Courts have ruled that a cause of action is ripe for judicial review when it is a present, not a hypothetical, contingent or remote prejudice to the plaintiff (See, *Ashley Builders Corp. v. Town of Brookhaven*, 39 Ad3d 442 [2d Dept. 2007]; *Waterways Development Corp. v. Lavalle*, 28 AD3d 539 [2d Dept. 2006]). If the cause of action is not ripe, then dismissal, pursuant to CPLR §3211(a)(7) is appropriate (*Ashley Building Corp.*, supra).

A review of the Purchase Option Agreement and Assignment Agreement reveals that it states, in relevant part:

> 1. KNOW ALL that in exchange of good and valuable consideration, receipt and sufficiency of which is herein acknowledged, Assignor hereby guarantees to the Cash Capital Investors the complete return of their respective Cash Capital Investments totaling ONE MILLION FIFTY THOUSAND DOLLARS ($1,050,000.00)(the "Repayment Amount"). If after one (1) year from the first date that Assignee engages in operations for the purpose of manufacturing polyethylene sheeting products with the intent to sell, offer for sale or otherwise market the products manufactured on that day (the "Start-up Date")(i) the Cash Capital Investors have not received gross compensation and/or reimbursement, either by way of distributions, dividends or debt repayment, in an amount equal to or greater than the Repayment Amount; and (ii) the Cash Capital Investors have not provided to

> Assignee written statements indicating their respective intentions to leave some or all of the Repayment Amount in the temporary possession of the Purchase, then all of Assignor's right, title and interest, including remedies of Assignor, in and to the Accounts Receivable and in and to the Inventory shall automatically, and without the need for any party to take any further steps, be assigned, transferred and set-over to Assignee, its successors and assigns (hereinafter collectively referred to as the "Assignments").

It is uncontested that, Re-Poly never began to engage in operations for the purpose of manufacturing polyethylene sheeting products with the intent to sell, offer for sale or otherwise market the products manufactured. Thus, it is clear that there is no "Start-Up Date", as defined by the Purchase Option Agreement and Assignment Agreement. Accordingly, plaintiffs' allegations in their fourth and fifth causes of action are not yet ripe, and defendant Dragonides' and Maine's motion to dismiss these causes of action is granted.

This court will now consider defendants Dragonides' and Maine's motion, pursuant to CPLR §3211(a)(7), to dismiss the remainder of the complaint due to plaintiffs' failure to state a cause of action.

Plaintiffs' second and third causes of action allege breach of fiduciary duty. In order to maintain an action for breach of fiduciary duty, plaintiffs must plead that a fiduciary relationship existed between the parties and that there is a breach of this relationship (See, *WIT Holding Corp. v Klein*, 282 AD2d 527 [2d Dept.2001]). In their complaint, plaintiffs assert that defendants Dragonides and Chin, the President and Treasurer of Re-Poly, respectively, each had a fiduciary duty to the plaintiffs and that they each breached this duty. Thus, the plaintiffs have sufficiently pled their second and third causes of action.

Plaintiffs' first cause of action seeks damages for the negligence of defendant Dragonides and Chin. To maintain a cause of action for negligence, plaintiffs must plead that the defendants owed a duty to the plaintiffs, that the defendants breached this duty and that the plaintiffs were injured as a result of this breach (See, *Akins v. Glens Falls City School District*, 53 NY2d 325 [1981];*Stukas v Streiter*, 918 NYS2d 176 [2d Dept. 2007]). Additionally, it is well-settled that an action for negligence arising out of the same acts as a related breach of duty or breach of contract action may only be maintained if it is shown that the negligence arose from a breach of a duty distinct from its contractual duties (See, *Sommer v. Federal Signal Corporation*, 79 NY2d 540[1992]; *Clark-Fitzpatrick v. Long Island Railroad Company*,

70 NY2d 382[1987]); *Kallman v Pinecrest Modular Homes, Inc.*, 81 AD3d 692 [2d Dept. 2011]).

In the instant action, plaintiffs' allegations of negligence against defendants Dragonides and Chin arise solely out of their duties as President and Treasurer of Re-Poly, respectively. Thus, plaintiffs have failed to demonstrate that any legal duty, independent of their fiduciary duties, was breached. Where a plaintiff is essentially seeking enforcement of the benefit of contractual or fiduciary duty, the negligence allegations must be dismissed (See,*Clark-Fitzpatrick*,supra). Accordingly, plaintiffs' first cause of action, seeking damages for negligence is dismissed as against defendant Dragonides.

Plaintiffs' sixth cause of action seeks dissolution of Re-Poly. Pursuant to BCL §1104, a court may dissolve a corporation, whose shares are not publicly traded, upon application of the holders of 50% or more of the shares entitled to vote. In the instant action, it is uncontested that defendant Dragonides owns 50% of the shares of Re-Poly and that plaintiffs Makarobskaia Kondratyev, Goloubenko and Konovalov own the remaining 50%. Plaintiffs' complaint avers that the shareholders are so divided that dissolution would be beneficial. Thus, plaintiffs have sufficiently pled a cause of action seeking judicial dissolution. Accordingly, the instant motion seeking to dismiss the sixth cause of action, pursuant to CPLR §3211(a)(7) is denied.

That portion of the instant motion which seeks to dismiss the complaint, pursuant to CPLR §3211(a)(5), is denied as moot. Defendants Dragonides and Maine assert that the complaint must be dismissed because both the Shareholders' Agreement and the Purchase Option Agreement mandate that the parties settle any claims arising out of the Agreements in arbitration. However, only plaintiffs' fourth cause of action, seeking specific performance, arises out of the Purchase Option Agreement. As this cause of action has already been dismissed by this court, pursuant to CPLR §3211(a)(7), that portion of the instant motion which seeks dismissal pursuant to CPLR §3211(a)(5) is denied.

Defendants Dragonides and Maine also move, pursuant to CPLR §3211(a)(1), to dismiss the complaint by relying solely on documentary evidence for the defense of this litigation. A complaint which is facially sufficient may be dismissed if there exists documentary evidence which conclusively contradicts the claims (See, *Smuckler v. Mercy College, et al*, 244 A.D.2d 349 [2d Dept. 1997]. However, a motion to dismiss pursuant to CPLR §3211(a)(1) will only be granted if documentary evidence resolves all of the factual issues as a matter of law (See, *Fontenetta v. John Doe 1*, 73 AD3d 78 [2d Dept. 2010]).

Plaintiffs assert that the defendants breached their fiduciary

duties by failing to safeguard the property of Re-Poly and by failing to maintain insurance on said property. Moving defendants Dragonides and Maine assert that the documentary evidence, including the corporate Release, Assignment, Covenant Agreement and Purchase Option Agreement, proves that each of Re-Poly's shareholders was responsible for operating the company and taking precautionary actions on behalf of Re-Poly. Although the movants assert that this joint responsibility, as delineated in the submitted documents, negates their individual culpability, this assertion is misguided. The submitted documents do not contain a waiver of defendant Dragonides' fiduciary duties as President. Thus, as the movants have failed to prove that documentary evidence conclusively contradicts plaintiffs' claims or resolves all issues of fact, that portion of the instant motion which seeks dismissal of the complaint pursuant to CPLR §3211(a)(1) is denied.

Accordingly, plaintiffs' first and fourth cause of action are hereby dismissed as against defendant Dragonides. Plaintiffs' fifth cause of action is dismissed as against defendant Maine. The remainder of defendants Dragonides' and Maine's motion to dismiss the complaint is denied.

That portion of the instant motion which seeks sanctions against the plaintiffs is denied. Defendants Dragonides and Maine have failed to demonstrate that such relief is warranted. Finally, it is,

ORDERED that all parties are directed to appear for a Preliminary Conference before Referee Richard Lazarus at the REF Preliminary Conference Part on June 7, 2011 at 11:30 a.m. The foregoing constitutes the decision, judgment and order of this court.

Dated: April 15, 2011

JANICE A. TAYLOR, J.S.C.

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