SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 24, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

1973 The People of the State of New York, Respondent, Ind. 1656/06

-against-

Jorge Pagan,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Steven B. Wasserman of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cherly Payer of counsel), for respondent.

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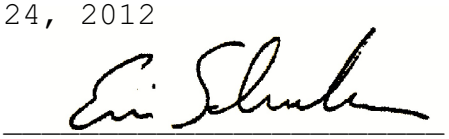
Upon remittitur from the Court of Appeals (__NY3d__ [2012], 2012 NY Slip Op 04278), appeal from order, Supreme Court, Bronx County (Denis J. Boyle, J.), entered on or about January 29, 2009, which enlarged the conditions of defendant's sentence of probation to permit searches of defendant's home, concomitant with home visits by the Department of Probation, unanimously dismissed, pursuant to the opinion of the Court of Appeals.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 24, 2012



DEPUTY CLERK

Mazzarelli, J.P., Andrias, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

6911 The People of the State of New York, Ind. 2469/97
Respondent,

-against-

Curtis Woods,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

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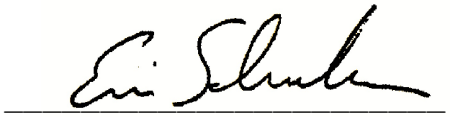
Judgment of resentence, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered August 25, 2010, as amended September 28, 2010, resentencing defendant, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, with three years' postrelease supervision, unanimously affirmed.

In this resentencing proceeding under CPL 440.46, the court properly adjudicated defendant a second felony drug offender

whose prior felony conviction was a violent felony, even though he was only adjudicated an ordinary second felony offender at his original sentencing (*see People v Dais*, 81 AD3d 432 [2011], *affd* __ NY3d __, 2012 NY Slip Op 04201 [2012]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 24, 2012



DEPUTY CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7042 Jocelyne Wildenstein, Index 650968/10
Plaintiff-Respondent,

-against-

5H&Co, Inc., et al.,
Defendants-Appellants.

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Peckar & Abramson, P.C., New York (Paul Monte of counsel), for appellants.

Carter, Ledyard & Milburn LLP, New York (Lawrence F. Carnevale of counsel), for respondent.

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Order, Supreme Court, New York County (Debra James, J.), entered on or about April 11, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the first, sixth and eighth causes of action asserted against defendant 5H&Co., and all causes of action asserted against defendant Alex Stojanovic in his personal capacity, unanimously modified, on the law, to the extent of dismissing the first, second, sixth and eighth causes of action in their entirety and the fourth and ninth causes of action as against defendant Stojanovic only, striking plaintiff's demand for punitive damages, and otherwise affirmed, without costs.

Plaintiff hired the corporate defendant, 5H&Co., to perform renovations to her apartment. Pursuant to a contract, defendant was to render its services based on an hourly rate and plaintiff

would reimburse it for expenses. Defendants provided an estimate as to how long it would take to complete the project, but the project ran into serious cost and time overruns. Plaintiff claims that defendant Stojanovic represented himself to be an architect and held out 5H&Co., his company, as qualified to perform the home improvement services plaintiff wanted. However, contrary to these representations, plaintiff claims that Stojanovic is neither a licensed architect in New York nor a licensed New York home improvement salesperson. Plaintiff further claims that defendants' work was defective or incomplete and that they left her with "uninhabitable living space."

The complaint sets forth nine causes of action, most of which are duplicative of the seventh cause of action for breach of contract. The first cause of action, against 5H&Co., seeks a declaratory judgment that the contract is void and unenforceable because 5H&Co violated Title 20, chapter 2, subchapter 22 of the Administrative Code of the City of New York § 20-387 that requires a contractor to obtain a home improvement license prior to entering into a home improvement contract or performing home improvement services. The second cause of action, against defendant Stojanovic, seeks a declaratory judgment declaring the contract void for violation of the same provision.

The third cause of action seeks to remove a mechanics' lien

5H&Co filed against the property. However, because defendants have removed the mechanics' lien, the court dismissed the third cause of action and it is not at issue on this appeal.

The fourth cause of action, for fraud, alleges that defendants intentionally misrepresented their qualifications and undervalued the cost and time to complete the renovation work. Attendant to this cause of action, plaintiff seeks punitive damages, attorneys' fees and penalties. Although plaintiff asserted fraud against both defendants, they appeal the denial of their dismissal motion as to this cause of action only to the extent plaintiff has directed it against defendant Stojanovic.

Plaintiff asserts the fifth cause of action, for conversion, against both defendants, but defendants appeal the denial of their dismissal motion as to this claim only to the extent plaintiff has asserted it against Stojanovic. Plaintiff claims defendants have retained certain items that belong to her in an attempt to extort more money from her.

The sixth cause of action asserts that both defendants were negligent in performing home improvement services by, inter alia, failing to obtain the necessary permits from the Department of Buildings and failing to sequence work properly, resulting in damage to plaintiff's personalty and necessitating additional work.

The seventh cause of action, for breach of contract against 5H&Co, also seeks a declaratory judgment that the contract is void and unenforceable. Defendants have not moved to dismiss this cause of action.

The eighth cause of action asserts professional malpractice against both defendants. The ninth cause of action, alleging trespass, asserts trespass against both defendants for allegedly entering into Apartment 51A while plaintiff was on vacation in Spain and demolishing the apartment. The ninth cause of action seeks punitive, as well as compensatory, damages. Defendants moved to dismiss the ninth cause of action as against defendant Stojanovic only. Although there are certain claims that defendants have not moved to dismiss as against 5H&Co., they have requested us to strike every demand for punitive damages.

To support her claim for fraudulent inducement, plaintiff alleges that, to induce her to enter a home improvement contract, Stojanovic misrepresented presently existing facts, including that he was a licensed architect, and that he and 5H&Co. were "qualified" and "licensed as architects or as home improvement contractors or salespersons." Even if defendant's misrepresentations were collateral to the contract, defendants correctly argue that plaintiff could not have reasonably relied on Stojanovic's misrepresentation of possession of the requisite

licenses, as this circumstance is easy to verify through public records (*see Fariello v Checkmate Holdings, LLC*, 82 AD3d 437, 437-38 [2011]; *Urstadt Biddle Props., Inc. v Excelsior Realty Corp.*, 65 AD3d 1135, 1137 [2009]).

The complaint alleges that Stojanovic also made misrepresentations to the building manager and the condominium board. Generally, however, a plaintiff cannot claim reliance on misrepresentations a defendant made to third parties (*see Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297 [2004], *lv denied* 4 NY3d 707 [2005]). Moreover, underestimating the cost of the job relates to a future intent to perform that is not actionable as fraud (*see GoSmile, Inc. v Lenne*, 81 AD3d 77, 81 [2010], *lv dismissed* 17 NY3d 782 [2011]). Accordingly, the motion court should have dismissed the fourth cause of action against Stojanovic.

Administrative Code of the City of New York § 20-387 forbids the soliciting, canvassing, selling, performance, or obtaining of "a home improvement contract as a contractor or salesperson from an owner without a license therefor." Accordingly, an unlicensed home improvement contractor cannot recover for services rendered either on the contract or in quantum meruit" (*Intrepid Elec. Contr. Co., Inc. v Serure*, 34 AD3d 430, 431 [2006]; *Metrobuild Assoc., Inc. v Nahoum*, 51 AD3d 555, 556 [2008], *lv denied* 11 NY3d

704 [2008]). However, this provision of the Administrative Code does not itself provide grounds for plaintiff to recoup fees already paid, because the law renders the contract "rescinded and generally 'the parties . . . should be left as they are'" (*see Brite-N-Up, Inc. v Reno*, 7 AD3d 656, 657 [2004] [citation omitted]).

Notwithstanding the above, plaintiff retains the right at common law to seek restitution for payments she previously made for work that defendant failed to perform or for defective work (*see O'Malley v Campione*, 70 AD3d 595 [2010]; *Brite-N-Up*, 7 AD3d at 657). As we stated in *Campione*, the Administrative Code "is not a bar to plaintiff's recovery of restitution for payments made" (*Campione*, 70 AD3d at 595). In this regard, although the causes of action at issue focus on defendants' lack of a license, read broadly, the complaint repeatedly charges defendants with defective and incomplete work, that if true, would justify restitution.

Although plaintiff may be entitled to seek return of the fees she paid for work that was incomplete or defective, that does not mean plaintiff can maintain those causes of action that duplicate the seventh cause of action for breach of contract. For example, the first two causes of action seek declarations that the contract is void and unenforceable. The seventh cause

of action for breach of contract seeks, not only compensatory damages, but also a declaration that the contract is void and unenforceable. Accordingly, the first and second causes of action should have been dismissed as duplicative.

The motion court also should have dismissed the cause of action for negligence. The alleged "extra-contractual" services upon which plaintiff bases her negligence claim duplicate the allegations concerning breach of contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [internal citations omitted] ["(i)t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract"]). Even the alleged damages are identical in both causes of action, seeking "compensatory damages in an amount to be proven at trial, but not less than $1,333,962."

The ninth cause of action for trespass repeats the same allegations that form the basis of plaintiff's claim for breach of contract. And, again, seeks the same damages. Accordingly, the cause of action for trespass is duplicative and the motion court should have dismissed it. However, as defendants have not

moved to dismiss this claim as to defendant 5H&Co., we dismiss only as to defendant Stojanovic.

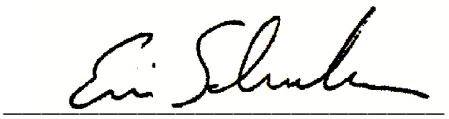
Defendants appeal the denial of the dismissal of the fifth cause of action for conversion only as against defendant Stojanovic. Although it appears from the record that defendants have returned plaintiff's personal property, defendants do not rely on that fact in their briefs. Rather, the only argument defendants make on appeal is that Stojanovic cannot be personally liable for acts that are not independent torts. However, taking plaintiff's personal property "in order to extort from Plaintiff the money she claims she owes them" as the complaint alleges, is an independent tort (*cf. I.C.C. Metals, Inc v Municipal Warehouse Co.*, 50 NY2d 657, 663 [1980] [if plaintiff were to be successful in proving conversion, defendant would not be entitled to limitation of liability provision in warehouse receipt]). This is because these allegations set forth a wrong separate and distinct from the breach of contract claim. Accordingly, we cannot dismiss this cause of action.

As the complaint does not allege that defendants committed architectural malpractice or that they engaged in the unauthorized practice of architecture, plaintiff's eighth cause of action for professional malpractice is not viable (*see Chase Scientific Research v NIA Group*, 96 NY2d 20, 29 [2001]).

Finally, plaintiff's demand for punitive damages should have been stricken for failure to plead "a pattern of conduct directed at the public generally" (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 24, 2012



DEPUTY CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7094 The People of the State of New York, Ind. 1664/09
Respondent,

-against-

Nicole Carter,
Defendant-Appellant.

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Richard M. Greenberg, Office of Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein of counsel), for respondent.

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Judgment, Supreme Court, New York County (Roger Hayes, J.), rendered July 1, 2010, convicting defendant, after a jury trial, of welfare fraud in the third degree, grand larceny in the third degree, and offering a false instrument for filing in the first degree, and sentencing her, as a second felony offender, to an aggregate term of two to four years, unanimously reversed, on the law, and the matter remanded for a new trial.

The People allege defendant misrepresented her employment status and income when she applied to the New York City Human Resources Administration (HRA) for food stamp benefits, temporary assistance, and medical assistance, indicating on the application that she was unemployed and had no income or resources. The theory of the prosecution was that defendant worked for the United States Postal Service (USPS), and had lied about her

income and employment status so she could receive benefits she otherwise would not be entitled to receive. Although the prosecution established that a person named Nicole Carter improperly obtained public assistance benefits, the critical question is whether a circumstantial evidence charge should have been given.

The People introduced time sheets and pay stubs from the USPS for Nicole Carter, as well as an application for welfare benefits that had been completed and recertified by Nicole Carter. Three witnesses testified for the People - a USPS special agent, and two investigators from the fraud department at HRA. The USPS special agent testified that based on his review of the pay stubs and time sheets for August 21, 2006 through the spring of 2009, Nicole Carter was employed full time, with intermittent periods of approved leave. The special agent also testified that from the end of 2006 until October of 2007, Nicole Carter earned a gross biweekly income ranging from $1,234.13 to $2,725.76.

Through the testimony of the two HRA fraud investigators, the People showed that an individual with the same name, birth date, and social security number as the USPS employee completed an application for benefits on April 26, 2006. The application recorded that Nicole Carter was unemployed, had no income of any

kind, and no "resources." The application also reflected that Nicole Carter could not accept a job at that time due to illness or injury. The first HRA investigator explained that benefits applications need to be periodically recertified to reflect any changes in status, which in turn, could affect the amount of benefits the applicant receives. The initial application is usually completed by hand, and then entered into the computer system by an HRA employee, whereas the recertifications are completed and signed electronically. The applicant is not required to fill out a new form at the time of recertification; rather, the applicant typically will meet with an HRA employee, answer a series of questions, and the HRA employee will enter the recertification information into the computer.

The People introduced two recertifications bearing the same identifying information as the initial application and the USPS pay stubs and time sheets. The first recertification took place on August 7, 2006 and the second recertification was completed on May 15, 2007. Both recertifications reflected that Nicole Carter was unemployed at the time. The HRA investigator who testified regarding the application and recertification process had no knowledge of whether Nicole Carter was actually present to recertify her application. However, during the time the benefits were received, based on the USPS special agent's testimony, the

USPS employee identified as Nicole Carter was working full time, and, based on the HRA investigator's testimony, earning an income that did not qualify her to receive benefits. The second HRA fraud investigator explained that the HRA fraud division sent a letter to Nicole Carter, requesting that she come in for an interview, and the investigator identified defendant as the person who came to the office for the interview. Defendant did not call any witnesses or testify on her own behalf.

At the charging conference defendant requested the jury be given the circumstantial evidence charge; however, the trial court declined to give the requested charge. Although we find that the evidence at trial was legally sufficient (*see People v Bleakley*, 69 NY2d 490 [1987]) and the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]), we nevertheless reverse because the trial court should have given a circumstantial evidence charge.

"Whenever a case relies wholly on circumstantial evidence to establish all elements of the charge, the jury should be instructed, in substance, that the evidence must establish guilt to a moral certainty" (*People v Daddona*, 81 NY2d 990, 992 [1993]). The purpose of the charge is to foreclose the danger that "the trier of facts may leap logical gaps in the proof offered and draw unwarranted conclusions based on probabilities

of low degree" (*People v Ford*, 66 NY2d 428, 442 [1985]), because "[w]hen a case rests entirely upon circumstantial evidence, the finder of fact is required to perform a complex analytical function" (*People v Barnes*, 50 NY2d 375, 380 [1980]). Indeed, the finder of fact is required to piece together a puzzle before it can even arrive at its determination, and thus, by telling the jury that "the facts perceived as a whole must exclude to a moral certainty every conclusion other than guilt," the law alerts the factfinder to the "rigorous function which must be undertaken" (*People v Barnes*, 50 NY2d at 380).

Here, the trial court should have given the charge because the People's case rested wholly on circumstantial evidence (*see People v Daddona*, 81 NY2d at 990). Although defendant's name was identical to that of the person who received the welfare benefits, no one identified defendant as the individual who completed the HRA forms, or as the individual who worked for the USPS. The HRA investigator's testimony identifying defendant as the person who appeared at the fraud office was not direct evidence relating to defendant's complicity in the crimes charged because an inference still needed to be drawn that the person who responded to the letter was the same person who falsely applied for benefits (*see People v Lynch*, 309 AD2d 878, 878 [2003], lv denied 2 NY3d 742 [2004] [circumstantial evidence charge should

have been given where there was "no direct evidence establishing the identity of the burglar" and the evidence of defendant's guilt was wholly circumstantial]). Further, although the investigator stated that defendant showed her photo identification before their meeting, no copy of this identification was introduced, nor could the investigator offer any details. In addition, no testimony was offered to establish that any of the identifying information on this photo identification matched the information in HRA's system or the information on the USPS pay stubs. Indeed, this testimony did nothing to connect defendant with the person who committed the crimes, except by way of a chain of speculative inferences.

Nor were the remaining documents the People submitted direct evidence which eliminated the necessity of a circumstantial evidence charge. The People put forth documents showing that someone named Nicole Carter worked for the USPS and that an individual with the same name, birth date, and social security number listed on the USPS pay stubs applied for welfare benefits. Those documents do not constitute direct evidence that defendant was indeed the Nicole Carter listed as a USPS employee, or that defendant was the individual who completed the HRA application. Indeed, the People made no effort to introduce specific evidence that defendant shared any of the pedigree characteristics with

the person who improperly obtained government benefits. We do not even know what information, such as defendant's birth date or address, was given to the police as part of the routine arrest process in this case. Nor did the People seek to introduce tax records or other government documents that would have contained defendant's birth date, social security number, or address. Further, although the first HRA investigator testified that the application and recertifications were signed by Nicole Carter, the prosecution did not introduce any expert handwriting testimony or any handwriting exemplars connecting defendant to the signatures on the forms.

Contrary to the People's argument, this case is not one where "both direct and circumstantial evidence are employed to demonstrate a defendant's culpability" thereby negating the need for the charge (*People v Barnes*, 50 NY2d 375, 380 [1980]; *see also People v Roldan*, 88 NY2d 826 [1996]). In cases where the charge was not necessary, there was direct evidence, in the form of eyewitness testimony identifying the defendant as the perpetrator of the crime, or an admission of guilt by the defendant (*see Barnes*, 50 NY2d at 375 [three police officers testified, identifying the defendant as the individual hiding in the store, which had a broken front window, was in disarray, and was missing appliances and electronics]; *Roldan*, 211 AD2d at 366,

affd 88 NY2d 826 [the two victims testified that they observed the defendant and his accomplice in conversation on the subway, next saw the defendant stand at the top of the subway platform stairs while his accomplice robbed them, and then watched as the individuals fled together]; *People v Guidice*, 83 NY2d 630, 636 [1994] [the defendant's recorded statements that he had sent two men to break the victim's legs constituted an admission of guilt, and thereby was direct evidence, negating the need for a circumstantial evidence charge]). No such direct evidence, either in the form of eyewitness testimony or an admission by defendant, exists here.

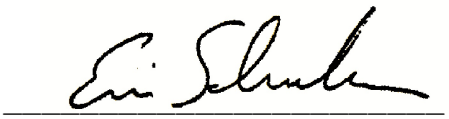
In order for the jury to find defendant guilty it had to make a number of logical leaps connecting defendant to the crimes charged. Had the trial court given the circumstantial evidence charge, alerting the jury of the need to exclude to a moral certainty every other reasonable hypothesis of innocence, the verdict may have been different (*see People v Crespo*, 198 AD2d 85 [1993], *lv denied* 82 NY2d 923 [1994]). Further, the circumstantial evidence adduced at trial did not overwhelmingly establish defendant's guilt, "precluding the conclusion that the

failure to give the proper charge was harmless error" (*People v Lynch*, 309 AD2d at 878).

We have considered defendant's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 24, 2012



DEPUTY CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, Román, JJ.

7291 Joseph Budano, Index 301199/09
Plaintiff-Respondent,

-against-

Andrew Gurdon,
Defendant-Appellant.

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Lester Schwab Katz & Dwyer, LLP, New York (Lawrence A. Steckman of counsel), for appellant.

O'Hare Parnagian LLP, New York (James Trainor of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered June 11, 2010, which denied defendant's motion to, among other things, compel plaintiff to authorize the release of medical records pertaining to alcohol and drug treatment, mental health information, and HIV-related information, if any, and granted plaintiff's cross motion for a protective order as to those records, unanimously affirmed, without costs.

Plaintiff claims that he sustained physical injuries when he slipped and fell on a staircase in a building owned by defendant. Plaintiff alleged in his supplemental bill of particulars that his injuries "are believed to be permanent in their nature and/or consequences." Plaintiff, who was unemployed at the time of the incident, also alleged that he believed that the accident caused him to be incapacitated from employment and that such

incapacitation would be permanent.

At a discovery status conference, defendant requested that the court order plaintiff to authorize the release of his records from Lincoln Medical and Mental Health Center, where plaintiff was treated after the accident, relating to plaintiff's "substance abuse and/or substance treatments." The court denied the request. Plaintiff subsequently executed an authorization form and served it on defendant, but declined to check the boxes on the form specifically permitting inspection of records related to alcohol and drug treatment, mental health information and HIV-related information.

Defendant moved to compel plaintiff to authorize the release of such health information. In the alternative, defendant requested an in camera inspection of plaintiff's Lincoln Hospital records, to be attended by the parties, or permission to serve a judicial subpoena directing Lincoln Hospital to produce such records. In support of the motion, counsel asserted that plaintiff had "admitted at his deposition that he has a drug and alcohol history for which he has received treatment in detoxification programs" and that plaintiff had "received such treatment before and after the subject incident." However, counsel failed to attach a deposition transcript or any other documents establishing those facts. Counsel argued that

plaintiff's alleged history of substance abuse raised doubt as to the cause of his fall. He further contended that plaintiff's alleged substance abuse could "have an effect on his prognosis, present health condition, and future medical care." He did not assert that plaintiff was HIV positive, nor did he address why that would be relevant to the litigation.

Plaintiff cross-moved for a protective order precluding production of his protected health information. In an affirmation, plaintiff's counsel argued that plaintiff had not put his mental health or any treatment for substance abuse or HIV at issue, and, as such, was entitled to a protective order against disclosure of such information. Plaintiff's counsel asserted that none of plaintiff's Lincoln Hospital medical records suggested that he had been under the influence of alcohol, drugs, or had HIV at the time of the accident, or that substance use hindered his ability to be treated medically and heal from his injuries. Plaintiff's counsel reported that, "given the nature of the hospital admissions, treatments, and quantity of records," Lincoln Hospital "could not redact or otherwise separate records pertaining to [protected health information] and produce only those records unrelated to such conditions." Counsel asserted that, in order to facilitate plaintiff's deposition, he had obtained and reviewed all of

plaintiff's Lincoln Hospital medical records, and had produced "the few records that did not disclose "privileged [health] information." Counsel further noted that, during his deposition, plaintiff had denied drinking alcohol or using illegal drugs within the 24 hours preceding his accident. Counsel also argued that defendant's alternative request for an in camera inspection of plaintiff's medical records, to be attended by the parties, was improper and against the very purpose of in camera review. Conversely, counsel acknowledged that issuance of a subpoena duces tecum to Lincoln Hospital was appropriate, but requested that the subpoena direct Lincoln to produce any records to the court for its review. The court denied defendant's motion and granted plaintiff's cross motion for a protective order.

The burden of proving that a party's mental or physical condition is in controversy, for purposes of obtaining relevant hospital records, is on the party seeking the records (*Koump v Smith*, 25 NY2d 287, 300 [1969]). In *Koump*, the plaintiff sought records that would establish that the defendant was operating his vehicle under the influence of alcohol at the time of the accident. The Court, in declining to order production of the records, stated as follows: "In the instant case, it is clear that the record developed below was not sufficient to support a conclusion that the defendant's physical condition is in

controversy. The only support for the motion is the affidavit of the plaintiff's attorney. That affidavit, which does not appear to be based upon personal knowledge, contains no facts; it merely refers the court to the allegations of the complaint and concludes that defendant was intoxicated because a police report indicates that this was so. However, neither the police report nor a policeman's affidavit nor a doctor's affidavit is attached to the moving papers. Indeed, there is no competent evidence in the record to show whether defendant was even confined in Nyack Hospital or whether a blood test was taken" (*id.*).

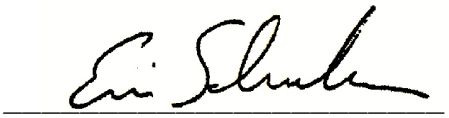
Similarly in this case, it is impossible to tell from defendant's submissions, also consisting almost exclusively of the affirmation of an attorney not claiming to have personal knowledge, whether plaintiff has a drug or alcohol dependency or whether he has HIV. Defendant's counsel asserted that plaintiff admitted in his deposition that he had been treated for addiction, but he failed to annex the transcript so it is impossible for us to independently evaluate it. The affirmation was completely silent on the issue of HIV. Further, simply because plaintiff's counsel represented in his submission that Lincoln Hospital could not feasibly redact information concerning chemical dependency and HIV status from plaintiff's records does not establish that plaintiff had a substance abuse problem or was

HIV positive.

In any event, even if defendant had established that plaintiff suffered from chemical dependency and mental illness and had HIV, the requested discovery would not be warranted. Defendant failed to submit an expert affidavit or any other evidence that would establish a connection between those conditions and the cause of the accident, nor did he make any effort to link those conditions to plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life (*see Del Terzo v Hosp. for Special Surgery*, __ AD3d __ 2012 NY Slip Op 03713 [1st Dept 2012]; *Manley v New York City Hous. Auth.*, 190 AD2d 600, 600-601 [1993]). Without such support, "we are presented with nothing other than 'hypothetical speculations calculated to justify a fishing expedition'" (*Manley*, 190 AD2d at 601).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 24, 2012



DEPUTY CLERK

Andrias, J.P., Saxe, Catterson, Renwick, Román, JJ.

7497 Stewardship Credit Arbitrage Fund LLC, et al., Plaintiffs-Respondents, Index 600634/10

-against-

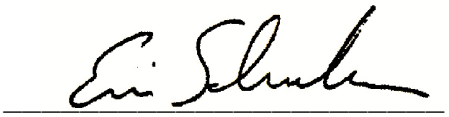
Charles Zucker Culture Pearl Corp., doing business as Precious Stone Co., et al., Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Bernard J. Fried, J.), entered on or about May 5, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 19, 2012,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JULY 24, 2012



DEPUTY CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7794-
7795-
7796 Twin Securities, Inc., et al., Index 652389/11
Plaintiffs-Appellants,

-against-

Advocate & Lichtenstein, LLP, et al.,
Defendants-Respondents,

T&M Protection Resources, LLC,
Defendant.

_____

Morrison Cohen LLP, New York (Danielle C. Lesser of counsel), for appellants.

Hinshaw & Culbertson LLP, New York (Richard Supple of counsel), for Advocate & Lichtenstein, LLP and Jason A. Advocate, respondents.

Advocate & Lichtenstein, LLP, New York (Jason A. Advocate of counsel), for Linda Simon, respondent.

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Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 29, 2011, December 8, 2011, and December 21, 2011, which, to the extent appealed from, denied plaintiffs' (collectively, Twin Capital) motion to disqualify defendants Jason A. Advocate and Advocate & Lichtenstein, LLP from representing defendant Linda Simon in this action, unanimously affirmed, without costs.

Twin Capital, an investment management firm, alleges that defendants improperly tampered with and copied information from a computer allegedly belonging to it. Twin Capital is solely

owned by nonparty David Simon, against whom defendant Linda Simon has commenced matrimonial proceedings. The computer at issue was at all relevant times located in the marital home, and defendants-respondents assert that it was freely accessible and used by members of the Simon family; Twin Capital disputes this claim.

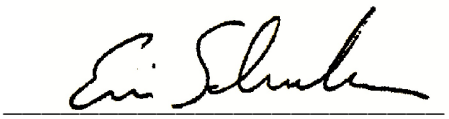
Rule 3.7(a) of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that, unless certain exceptions apply, "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact" (*id.*). Here, in the absence of discovery, it is premature to conclude that Jason Advocate is likely to be called as a witness on a significant factual issue (*see Harris v Sculco*, 86 AD3d 481 [2011]). Even if Mr. Advocate is likely to be a witness, discovery may reveal that his testimony "relates solely to an uncontested issue," one of the exceptions to the rule (*see* rule 3.7[a][1]). In light of this determination, we need not address the motion court's finding that disqualification "would work substantial hardship" on Linda Simon (rule 3.7[a][3]).

Nor is disqualification required under rule 1.7(a)(2) of the Rules of Professional Conduct (22 NYCRR 1200.0), which provides that, except under certain conditions, a lawyer shall not represent a client where there is a significant risk that the

lawyer's judgment on behalf of the client will be adversely affected by the lawyer's own interests (*see id.*). After consultation with independent ethics counsel, Linda Simon executed a conflict waiver (*see* rule 1.7[b][4]). At this early stage, defendants-respondents appear to be presenting a unified defense. Thus, any potential conflict is speculative at present. Twin Capital's argument that a conflict exists based on Mr. Advocate's alleged rejection of its offer to settle with Linda Simon is not properly before us. These allegations are contained in affidavits dated after the motion court rendered its decisions.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 24, 2012



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Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

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600396/08

John M. Ferolito, etc., et al.,
Plaintiffs-Appellants,

-against-

Domenick J. Vultaggio, et al.,
Defendants-Respondents.

- - - - -

[And Other Actions]

- - - - -

In re John M. Ferolito, etc.,
Petitioner-Appellant.

_____

Boies, Schiller & Flexner LLP, New York (David A. Barrett of counsel), for appellants.

Cadwalader, Wickersham & Taft LLP, New York (Louis M. Solomon of counsel), for respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered June 2, 2011, affirmed, with costs. Order, same court and Justice, entered June 3, 2011, affirmed, with costs. Order, same court and Justice, entered June 24, 2011, modified, on the law, to deny the motion as to the common-law dissolution cause of action the cause of action reinstated, and otherwise affirmed, without costs, and order, same court and Justice, entered April 14, 2011, affirmed, with costs.

Opinion by Sweeny, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
John W. Sweeny, Jr.
Rolando T. Acosta
Dianne T. Renwick, JJ.

7438-7439-7440N-7441N
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600396/08

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John M. Ferolito, etc., et al.,
Plaintiffs-Appellants,

-against-

Domenick J. Vultaggio, et al.,
Defendants-Respondents.

- - - - -

[And Other Actions]

- - - - -

In re John M. Ferolito, etc.
Petitioner-Appellant.

_____x

Plaintiff/Petitioner John M. Ferolito, appeals from the order of the Supreme Court, New York County (Martin Shulman, J.), entered June 2, 2011, which denied his motion for an order declaring invalid Beverage Marketing USA, Inc.'s Business Corporation Law § 1118 election to purchase his shares, the order, same court and Justice, entered June 3, 2011, which denied his motion to disqualify Cadwalader, Wickersham & Taft, LLP as counsel to BMU in the consolidated dissolution/valuation proceeding, and the order, same court and Justice, entered April 14, 2011, which denied his motion to compel shareholder distributions of profits.

Plaintiffs appeal from the order, same court and Justice, entered June 24, 2011, which, insofar as appealed from, granted defendant Vultaggio's motion to dismiss the Ferolito Trust's cause of action for common-law dissolution, and to stay the remaining causes of action.

Boies, Schiller & Flexner LLP, New York (David A. Barrett, Nicholas A. Gavante, Jr. and Helen M. Maher of counsel), for appellants.

Cadwalader, Wickersham & Taft LLP, New York (Louis M. Solomon, Colin A. Underwood and Michael S, Lazaroff of counsel), for respondents.

SWEENY, J.

These are four related appeals from orders deciding motions made in the litigation involving the AriZona Iced Tea business and its principal operating company, Beverage Marketing USA, Inc. (BMU). The first order denied plaintiff/petitioner John M. Ferolito's motion for a declaration that BMU's election to purchase his shares of stock was invalid. Ferolito also appeals from the denial of his motion to disqualify Cadwalader, Wickersham & Taft, LLP (Cadwalader) as counsel to BMU and from the order dismissing a common-law derivative dissolution proceeding brought against defendants. Lastly, Ferolito appeals from the order denying his motion to compel BMU to make cash distributions of profits to all shareholders. A review of the factual and historical background of this litigation is necessary to place these appeals in their proper context.

In 1992, plaintiff Ferolito and defendant Vultaggio formed the AriZona Iced Tea business, consisting of 21 entities known as the "AriZona Entities." BMU, which conducts the preponderance of the business of producing, marketing and distributing the AriZona Iced Tea line of beverages, is one of those entities. All of the Arizona Entities are owned equally by Ferolito and Vultaggio, along with members of their respective families (Owners Groups).

In 1997, due to strained relations between Ferolito and

Vultaggio, the parties agreed that Vultaggio would assume primary responsibility for the day-to-day management of the AriZona Entities. Ferolito retained his voting rights and, as co-owner of BMU, his right to participate in corporate decision-making.

In 1998, Ferolito, Vultaggio and their respective Owner Groups entered into an "Owners' Agreement." Its purpose was to set out the method of corporate governance, to maintain appropriate and businesslike relationships among the parties, and to assure the continuity of ownership and management of the Arizona Entities.

Section 3.1 of the Owners' Agreement provides that "all material matters respecting [the AriZona Entities] shall be resolved by mutual agreement of the [Owner Groups]." Section 2.1 provides that the general intent of the parties is that each Owner Group shall receive 50% of all distributions of profits. The Owners' Agreement also limits the sale or transfer of interest in the enterprise to "Permitted Transferees" (the Transfer Covenants).

In August 2008, the Ferolito Owners Group attempted to transfer a block of its shares in the AriZona Entities to an outside purchaser without Vultaggio's consent. Ferolito commenced litigation in New York County, seeking, among other things, nullification of the Transfer Covenants to allow him to

sell those shares without restriction. Vultaggio asserted counterclaims and both sides moved for summary judgment. The motion court dismissed Ferolito's cause of action challenging the transfer restriction, finding that the Transfer Covenants were valid and enforceable, and we affirmed. The remaining causes of action for breach of contract, unjust enrichment, etc., are still pending (Main Action).

Ferolito also filed a separate action in Nassau County in which his personal corporation sued BMU for breach of a promissory note. This action was transferred to New York County and consolidated with the Main Action.

Thereafter, as part of the Main Action, Ferolito filed an amended petition pursuant to Business Corporation Law (BCL) § 1104-a seeking a judicial dissolution of BMU, alleging that such dissolution was a necessary remedy given the provision in the Owners' Agreement barring him from selling his interests in BMU without Vultaggio's permission. He also alleged that Vultaggio's oppressive conduct was part of a fraudulent scheme to exclude him from the corporate affairs of the AriZona Entities and force him to sell his shares below their fair value. On this issue, Ferolito alleged that in February 2008, as part of a scheme to pressure him to sell his shares of BMU at a low price, Vultaggio ordered a unilateral termination of a long-standing practice of

distributing the vast majority of BMU's annual profits to the shareholders. His request for relief included a "Final Order" compelling BMU to resume making distributions to each Owner Group consistent with past practice.

Ferolito's BCL § 1104-a petition triggered buy-out rights on the part of Vultaggio, who notified the court and all parties of his election, pursuant to Business Corporation Law § 1118, to have BMU purchase its shares owned by Ferolito. This election stayed the Main Action. Ferolito moved to invalidate the BCL § 1118 election, arguing that section 3.1 of the Owners' Agreement precluded BMU from exercising its buy-out rights without obtaining Ferolito's consent. Vultaggio opposed, arguing that the Owners' Agreement did not require Ferolito's consent, particularly in light of his filing of the dissolution petition.

Ferolito also moved for an order compelling the cash distribution of 60% of the AriZona Entities' net income for the year 2010. Vultaggio opposed the motion, arguing that the decision not to distribute profits was necessitated by Ferolito's actions. Additionally, he argued that the money would be necessary to purchase Ferolito's BMU shares as a result of the BCL § 1118 election made in response to Ferolito's petition for judicial dissolution.

The motion court denied Ferolito's motion to invalidate

BMU's election, finding that applying section 3.1 of the Owners' Agreement as advocated by Ferolito under these circumstances would render the statutory scheme of BCL §§ 1104-a and 1118 a nullity. The court also determined that the application for the cash distributions was tantamount to a request for a preliminary injunction compelling distributions on an interim basis pending final resolution of the actions. Since Ferolito could not meet the requirements for such relief, and since he was requesting the same relief as in part of the main action, the motion was denied.

Ferolito's motion to disqualify Cadwalader also has its genesis in the commencement of litigation in 2008. At that time, BMU's general counsel and CEO analyzed the potential conflict issue regarding one firm's dual representation of BMU and Vultaggio. They determined that dual representation was desirable and retained Lou Solomon, Esq., who at the time was a member of Proskauer Rose, LLP, and the attorney for Vultaggio. Ferolito objected to this arrangement. Nonetheless, in 2008, BMU entered into a Joint Defense and Prosecution Agreement (JDPA) between Vultaggio and the AriZona Entities in which BMU consented to the dual representation and "waived any and all potential conflicts that may arise" during the course of the litigations. When Solomon left Proskauer and joined Cadwalader, he continued his representation of both Vultaggio and BMU.

Ferolito first moved for disqualification in the Main Action in April 2009, but withdrew the motion without prejudice. He also moved for disqualification in the Nassau County action in 2009, which motion was denied. He once again moved for disqualification in Nassau County in 2010 after filing the initial dissolution petition, but, before a decision was rendered, the action was consolidated with the Main Action. Counsel ultimately withdrew the pending motion.

On March 4, 2011, following BMU's election to buy his shares, Ferolito filed another motion for disqualification of Cadwalader, citing alleged conflicts of interest. Cadwalader opposed, arguing that the JDPA resolved any potential conflicts. The motion court denied Ferolito's application.

To further complicate matters, on January 13, 2011, Ferolito and the John Ferolito, Jr. Grantor Trust filed a new action alleging direct and derivative claims for breach of fiduciary duty against Vultaggio on behalf of BMU (the 2011 Action). Following BMU's election to purchase Ferolito's stock, he amended the complaint to add an additional claim on behalf of the Ferolito Trust for common-law dissolution. This action was based on allegations of Vultaggio's waste and oppression, including officer/director misconduct.

Vultaggio moved to dismiss the complaint in its entirety.

After a hearing, the court dismissed the Trust's common-law dissolution claim on the basis that it failed to state a cause of action and failed to demonstrate that Vultaggio was "looting" BMU, which the Trust admitted was a healthy, billion dollar company. The court also granted a stay of the remaining counts in the 2011 action, finding that the direct and derivative breach of fiduciary duty claims and officer/director misconduct claim were substantially the same as those alleged in the main action.

The BMU Dissolution/Election Order

BCL § 1104-a gives holders of 20 percent or more of the outstanding voting shares of a close corporation the right to petition for judicial dissolution as a remedy for illegal, fraudulent or oppressive conduct (*see Fedele v Seybert*, 250 AD2d 519, 521-522 [1998]; *Matter of Public Relations Aids*, 109 AD2d 502, 507, 509 [1985]). However, pursuant to BCL § 1118(a), a petition alleging grounds specified in BCL § 1104-a triggers the right of "any other shareholder or shareholders or the corporation" to "elect to purchase the shares owned by the petitioners at their fair value" (*see Fedele v Seybert*, 250 AD2d at 522; *Matter of Hung Yuk Ong*, 299 AD2d 173 [2002], *lv dismissed* 99 NY2d 610 [2003]). This election, once made, is irrevocable (*Matter of Chu v Sino Chemists,* 192 AD2d 315, 316 [1993]; *Matter of Doniger v Rye Psychiatric Hosp. Ctr.*, 122 AD2d 873 [1986], *lv*

denied 68 NY2d 611 [1986]). Such an election "is superior to dissolution because it permits the continuation of the corporation's existence" (192 AD2d at 317; *Matter of Smith v Russo*, 230 AD2d 863, 864 [1996], *lv dismissed* 93NY2d 848 [1999]). The buy out election "accommodates the interests of the respective parties in ensuring the continued functioning of the business, while also protecting the financial interest of the shareholders and creditors" (*Matter of Public Relations Aids*, 109 AD2d at 508).

Ferolito does not contest Vultaggio's right to make such an election in his individual capacity. Rather, he argues that Vultaggio's unilateral election on behalf of BMU violated section 3.1 of the Owners' Agreement, which provides that "all material matters respecting [the AriZona Entities] shall be resolved by mutual agreement of the [Owner Groups]," and thus the election must be set aside. We find no merit to this position.

Generally, the terms of a shareholder agreement should be given effect (*Matter of Penepent Corp.*, 96 NY2d 186, 192 [2001]). Statutory dissolution and election rights may be restricted (but not nullified) by contract (*see Schimel v Berkun*, 246 AD2d 725, 728 [1999], *lv dismissed* 94 NY2d 797 [1999]; *Matter of Doniger*, 122 AD2d at 877). "[S]hareholders can agree in advance that an 1104-a dissolution proceeding will be deemed a voluntary offer to

sell," as well as fix the "fair value" of the shares in the event of an 1118 election (*see Matter of Pace Photographers (Rosen)*, 71 NY2d 737, 747 [1988]; *Matter of Johnsen v ACP Distrib., Inc.*, 31 AD3d 172 [2006]). However, in the absence of an explicit agreement to that effect, a shareholder's agreement fixing the terms of a voluntary sale does not apply to limit BCL § 1118(a)'s "absolute" and "unconditioned" right to avoid dissolution by election, either by a shareholder or by the corporation itself (*Matter of Pace Photographers*, 71 NY2d at 744-745).

To adopt Ferolito's argument that a shareholder who commences a judicial dissolution proceeding can continue to assert management rights with respect to the corporation's right of election pursuant BCL § 1118 would thwart the statutory purpose of promoting the continuation of corporate enterprises. Absent an explicit agreement between the shareholders to limit the corporation's ability to exercise its statutory election right following the filing of a dissolution petition by one of its shareholders, the corporation may, without the consent of the petitioning shareholder, invoke its right of election pursuant to BCL § 1118. Simply put, without an explicit and unequivocal agreement to the contrary, a shareholder who petitions for dissolution should not have the ability to veto the corporation's election right. To do so would fly in the face of logic as well

as the purposes of the statutory scheme enacted by the Legislature (*see Matter of Public Relations Aids*, 109 AD2d at 509).

Here, while the Owners' Agreement provides a general mechanism for authorization of all BMU "material matters," neither the Owners' Agreement nor the company by-laws explicitly state that a mutual agreement requirement applies to the making of a corporate BCL § 1118 election. Without such an explicit provision, a non-petitioning shareholder who has day-to-day management of the corporation may unilaterally exercise, on behalf of the corporation, the right to elect to buy out the petitioning shareholder's shares (*Matter of Pace Photographers*, 71 NY2d at 747*; Matter of Johnsen*, 31 AD3d at 178*.* The court therefore properly denied Ferolito's motion.

Disqualification of Counsel

Disqualification is a matter that rests within the sound discretion of the trial court (*see Harris v Sculco*, 86 AD3d 481, 481 [2011]). "When considering a motion to disqualify counsel, a trial court must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of his or her choosing against the other party's right to be free from possible prejudice due to the questioned representation" (*Abselet v Satra Realty, LLC*, 85 AD3d 1406, 1407

[2011] [internal quotation marks omitted]).

While the Rules of Professional Conduct generally prohibit a lawyer from simultaneously representing clients with differing interests, an attorney may represent such clients where a disinterested lawyer would believe that the lawyer can competently represent the interest of each client and that each consents to the representation after full disclosure of the implications of simultaneous representation as well as the advantages and risks involved (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[b] [former Code of Professional Responsibility DR 5-105 (22 NYCRR 1200.24[c])]; *Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 151 [2006], *lv denied* 8 NY3d 802 [2007]; *Matter of Gustavo G.*, 9 AD3d 102 [2004]).

To the extent Vultaggio and BMU have any differing interests in connection with the decision of which party, if any, would exercise the BCL § 1118(a) election right, a disinterested lawyer could believe that dual representation would be appropriate. In these circumstances, where the non-petitioning shareholder runs the day-to-day operations of the corporation threatened with dissolution, any "differing interest" with respect to the BCL § 1118 election does not necessarily require separate counsel. Moreover, Vultaggio and BMU validly consented to the dual

representation, thereby waiving any potential conflict. It is thus not objectively unreasonable to believe that one law firm can adequately represent both BMU and Vultaggio under these circumstances. Accordingly, the court properly denied Ferolito's motion to disqualify counsel.

Common-Law Dissolution

A claim for common-law dissolution is properly stated where it is alleged with sufficient factual detail that the shareholders in control have been looting the company's assets at the expense of the minority shareholders, "continuing the corporation's existence for the sole purpose of benefitting those in control", and have sought "to force and coerce [the minority shareholders] to sell and sacrifice their holdings to those in control (*see Leibert v Clapp*, 13 NY2d 313, 315-316 [1963] [internal quotation marks omitted]; *Gilbert v Hamilton*, 35 AD2d 715 [1970], *affd* 29 NY2d 842 [1971]). While the Legislature supplemented this principle of judicially ordered equitable dissolution of a corporation by passing BCL § 1104-a, it does not appear that it intended BCL § 1104-a to be the exclusive remedy for aggrieved shareholders (*see Matter of Quail Aero Serv.*, 300 AD2d 800, 802 [2002]), and the courts continue to recognize the common-law cause of action (*see Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 69-70 [1984]; *Lemle v Lemle*, 92 AD3d 494

[2012]; *Matter of Dubonnet Scarfs*, 105 AD2d 339, 341 [1985]; *see also Collins v Telcoa Intl. Corp.*, 283 AD2d 128 [2001]; *Lewis v Jones*, 107 AD2d 931 [1985]).

Contrary to the motion court's finding, the allegations of fiduciary breaches by corporate management contained in the Ferolito Trust's cause of action are sufficient to state a claim for common-law dissolution. Furthermore, its timely filing subsequent to the filing of Ferolito's statutory dissolution petition did not prejudice BMU's election or Vultaggio's other rights. The fact that a corporation may be operating profitably is no bar to the grant of this type of relief in appropriate circumstances (*see Liebert,* 13 NY2d at 316). Moreover, the allegations of looting, when combined with the other allegations of oppression relating to the interests of the Ferolito Trust, are sufficient at this point in the litigation to state a claim for common-law dissolution (*see Lewis,* 107 AD2d at 932). Accordingly, that cause of action is reinstated.

The motion court, however, did not improperly stay the causes of action for direct and derivative claims for breach of fiduciary duty as well as the derivative claim for officer/director misconduct in deference to the Main Action based on the finding that the relief sought in both actions was substantially the same. Where a party's non-dissolution claims,

direct or derivative, and a BCL § 1118 valuation proceeding are "inextricably intertwined," we have ordered them to proceed in tandem before the same court, since the resolution of the non-dissolution claims may affect the "fair value" to be determined in the valuation proceeding (*see Edmonds v Amnews Corp.*, 224 AD2d 358 [1996]).

Shareholder Distributions Claim

The court properly denied Ferolito's motion to compel distributions of profit to the shareholders. The court correctly found that issues of fact precluded the grant of Ferolito's prior motion for summary judgment on a breach of contract claim alleging damages as a result of Vultaggio's preventing him from participating in management decisions, including decisions involving the timing and amount of shareholder distributions. Ferolito's motion therefore violated the rule against successive summary judgment motions (*see Hoffeld v Lindholm*, 85 AD3d 635 [2011]; *Jones v 636 Holding Corp.*, 73 AD3d 409 [2010]), and denial would be appropriate due to the remaining issues of material fact.

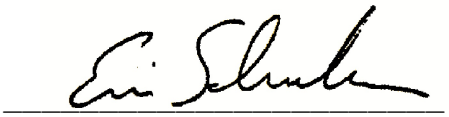
Accordingly, the order of the Supreme Court, New York County (Martin Shulman, J.), entered June 2, 2011, which denied petitioner John M. Ferolito's motion for an order declaring invalid BMU's Business Corporation Law § 1118 election to

purchase his shares, should be affirmed, with costs. The order, same court and Justice, entered June 3, 2011, which denied Ferolito's motion to disqualify Cadwalader, Wickersham & Taft, LLP as counsel to BMU in the consolidated dissolution/valuation proceeding, should be affirmed, with costs. The order, same court and Justice, entered June 24, 2011, which, insofar as appealed from, granted defendant Vultaggio's motion to dismiss the Ferolito Trust's cause of action for common-law dissolution, and to stay the remaining causes of action should be modified, on the law, to deny the motion as to the common-law dissolution cause of action the cause of action reinstated, and otherwise affirmed, without costs. The order, same court and Justice, entered April 14, 2011, which denied Ferolito's motion to compel shareholder distributions of profits, should be affirmed, with costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 24, 2012



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