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SHORT FORM ORDER

INDEX No. 11-38972

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 06/07/13
ADJ. DATES 09/25/13
Mot. Seq. # 008 - MOTD
CDISP Y____ N __X__

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NORTH COAST OUTFITTERS, LTD.,

Plaintiff,

-against-

CHARLES W. DARLING, III and CHARLES HORSE, INC., VALIANT ROCK, LLC., and RIVERS END LLC

Defendant.

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WICKHAM, BRESSLER, *et. al.*,
Attys. For No. Coast, Mills & Allison
PO Box 1424
Mattituck, NY 11952

HALEY, WEINBLATT, *et. al.*,
Attys. For Defs. Darling, Charles Horse Inc., & Rivers End, LLC
1601 Veterans Memorial Hwy. # 425
Islandia, NY 11749

Upon the following papers numbered 1 to 8 read on this motion by certain defendants for injunctive relief and partial summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers _____; Answering papers 4-5; 6 amended memo of law; Replying papers 7-8; Other _____; it is,

ORDERED that this motion (#008) by defendants, Charles W. Darling III, Charles Horse, Inc. and Rivers End, LLC, for provisional relief and an award of summary judgment on the plaintiff's FIFTEENTH cause of action for declaratory relief, is considered under CPLR 6311, 3001 and 3212 and is granted so as to award the moving defendants summary judgment on such cause of action to the extent of the declaration that follows; and it is further

ORDERED that the court hereby declares that defendant is the owner of a 51% shareholder interest in the plaintiff and that the purported forfeiture by a surrender of his shares that was proclaimed in the plaintiff's February 20, 2013 letter is null and void and without effect. The court further declares that defendant Darling is entitled to possession of the capital stock shares reflecting his 51% ownership interest in the plaintiff and is entitled to exercise all of the rights and benefits attendant with such ownership.

As presently constituted, this action is one in which the corporate plaintiff seeks recovery of money damages from defendant, Charles W. Darling, III (hereinafter Darling), and his company co-defendants, under tort and contract theories. In addition, the plaintiff seeks equitable and declaratory relief with respect to a denial or termination of contractual rights and entitlements of the defendants under the terms of agreements between them and the corporate plaintiff. However, the principal aim of the plaintiff in this action is its recovery of a judgment declaring that defendant Darling no longer owns a 51% interest in the plaintiff, that he is forever barred from serving as a director or officer of the plaintiff and that certain rights and revenues derived from patented products belong to the plaintiff. In effect, the plaintiff seeks a judicial confirmation of its ouster of defendant Darling from his rights to participate as the majority stockholder in the corporate plaintiff that was proclaimed in February of 2013 when Darling's stock shares were "deemed offered" and/or "surrendered and forfeited" to the plaintiff for "no value" because "book value" was then "in a negative position" (*see* Exhibit F attached to moving papers; see also ¶¶ 16-17 of the affidavit of Beatty and page 3 of the plaintiff's Memos of Law submitted in opposition to the motion). The contextual backdrop of the factual circumstances out of which these claims arise is recited below.

Defendant Darling founded the corporate plaintiff in 1998 for purposes of marketing mobile patient transport and recovery products for use by those engaged in emergency response and interim care of the sick and wounded. The products, which were designed by defendant Darling, are now marketed to dealers worldwide by the plaintiff. Defendant Darling secured patents utilized in the production of the products. Darling developed and trademarked a concept known as Charlie's Horse ® Deployment Systems, the use of which was licensed to the plaintiff under the terms of certain Sales and Licensing Agreements between Darling and the plaintiff. Defendant Darling served as the President, Chief Executive Officer and Chairman of its Board of Directors of the corporate plaintiff from its inception until August of 2011 and his role as CEO and/or president was the subject of various employment contracts executed by him and the plaintiff during this time period.

The plaintiff's entitlement to a judicial confirmation of the ouster of defendant Darling from his ownership interest in the plaintiff rests entirely upon claims that Darling failed to pay cash required by a pro rata call to shareholders to make capital contributions totaling $61,000.00 in March of 2003. This call was initiated by Darling's demand for payment of such amount under the terms of a Sales and License Agreement executed by him and the plaintiff in 2002 (*see* Exhibit A attached to plaintiff' opposing papers). Under the shareholder's agreement then in existence, the failure to pay an assessed capital call resulted in the loss of any recalcitrant shareholder's stock shares, provided that due notice of the default and an opportunity to cure it was served upon such shareholder by the corporate plaintiff (*see id.*, Exhibit G)

The pro rata capital contribution due from defendant Darling was $31,900.00. At that time of this 2003 call, there were six shareholders of the plaintiff, three of whom offered to loan Darling and two others shareholders the money due for their respective cash calls (*see* ¶¶ 9 -11 of Darling's Affidavit in Reply). The terms of these loans are reflected in the minutes of the March 24, 2003 shareholders' meeting that are attached as exhibits to the submissions of both sides on this motion (*see* Exhibit C of the opposing papers of the plaintiff and Exhibit A of the reply papers of the moving

defendants). The loan to Darling was stated to be one having "no-interest" that was "payable upon the sale of his shares or the company" (*see id.*). Defendant Darling claims that his loan arrangement was modified when the three "lender" shareholders agreed to jointly post a payment of $29,093.31 as a partial payment of the $61,000.00 owing to Darling under the Sales and Licensing Agreement. The balance of $31,906.69 that remained due and owing was to be paid from the plaintiff's ongoing operations (*see* ¶ ¶ 13- 14 of the Darlings affidavit in Reply). Evidence of this debt of some $31,900.00 owing to Darling is found in the recorded notes of a July 7, 2003 meeting taken by then secretary of the plaintiff (*see* Exhibit B attached to the Reply affidavit of defendant Darling).

As indicated above, defendant Darling served as Chairman, CEO and President of the plaintiff until July of 2011. Prior thereto, Darling allegedly engaged in acts of unfair competition allegedly aimed at converting the assets and business of the plaintiff. The instant action was commenced by filing on December 24, 2011. The plaintiff's original complaint contained twelve causes of action sounding in breach of fiduciary duties, unjust enrichment, breach of contract, unfair competition, an accounting, declaratory judgment, constructive trust and Darling's removal from the company due to such conduct. In April of 2012, the plaintiff moved to enjoin Darling from participating in a meeting as the plaintiff feared that he would use his majority ownership to restore himself to the Board of Directors and other offices. That motion was denied by order of this court dated December 12, 2012, due, in part, to the availability of other remedies.

Although Darling departed from the company in July of 2011, the plaintiff alleges that it only discovered his non-payment of the March 2003 call for capital contributions in October of 2012 from from information garnered by its newly retained accounting firm who had undertaken a review the plaintiff's corporate books and records. By letter dated February 20, 2013, the plaintiff advised defendant Darling that his failure to pay the moneys due under the March 2003 call constituted a breach of the amended shareholder's agreement then in effect (*see* Exhibit F attached to the defendants' moving papers). As a result, Darling was advised that his "shares of stock have been deemed offered to the corporation at book value" which "stands at $0 per share at this time" (*id).*

One week thereafter, the plaintiff served a supplemental summons and amended complaint that included a demand for a declaration, among others, that Darling had no ownership interest in the plaintiff as his stock shares had properly been deemed surrendered for no value as outlined in the February 20, 2013 letter of the plaintiff's president Beatty (*see* Exhibit F attached to the defendants' moving papers). In addition, the amended complaint of February 27, 2013 included this conduct as a separate count of the plaintiff's First cause of action wherein it seeks money damages by reason of Darling's purported breaches of fiduciary duties owing to the plaintiff (*see* ¶¶ 41-51 of the amended complaint attached as Exhibit G to the moving papers).

The claims of defendant Darling, as advanced on this motion, are sharply disputed by the plaintiff. It insists that Darling was fully paid all amounts due him in 2002 under the Sales and Licensing Agreement he had with the plaintiff (*see* ¶ 14 of Beatty's affidavit submitted in opposition to defendants' motion and Exhibit F attached). The plaintiff also claims that Darling successfully

concealed his failure to pay his pro-rata share of the 2003 capital call assessment until the plaintiff's discovery thereof in October of 2012 (*see* ¶¶ 12, 13 of Beatty's affidavit in opposition to the motion).

By the instant motion, defendant Darling seeks "dismissal" of the plaintiff's Fifteenth cause of action wherein it seeks a declaration that Darling is no longer a shareholder in the plaintiff corporation. The defendants contend said cause of action, which is premised upon Darling's alleged breach of the shareholders' agreement in 2003, is untimely due to the expiration of all applicable statute of limitations. The defendants further contend that no effective forfeiture by surrender of shares occurred as proclaimed by the plaintiff in February of 2013, since the plaintiff failed to comply with the notice of default and cure demand conditions precedent imposed upon any such forfeiture by surrender by the shareholder's agreement. The defendants also demand injunctive relief prohibiting the plaintiff from making certain distributions to other shareholders and from filing tax returns or holding shareholders' meetings which do not reflect the Darling's 51% ownership interest in the plaintiff. Defendant Darling also seeks an order which compels the scheduling of a shareholder's meeting of the type contemplated by BCL §602.

In its opposing papers, the plaintiff challenges the defendants' claims of entitlement to summary judgment in their favor on the plaintiff's Fifteenth cause of action for declaratory relief. That challenge is not, however, based upon claims that the Fifteenth cause of action was timely interposed prior to the expiration of statutes of limitations applicable thereto. Rather, the plaintiff claims that defendant Darling's concealment of his non-payment of the capital call and his failure to issue notice to himself of his default and a demand for a cure and other conduct on his part all work to estop Darling from asserting his statute of limitations defense. This assertion of the doctrine of equitable estoppel is premised upon allegations that Darling, as a fiduciary to the plaintiff, was required to disclose his nonpayment of his pro-rata share of the 2003 capital call and that failings on his part to do so and to take all efforts to secure such payment or to compel a surrender of his shares to the company, should not be allowed to work to his benefit.

To support its opposition, the plaintiff submits an affidavit by its president, Beatty, whose association with the plaintiff began after Darling's departure in 2011. Therein, Beatty avers that Darling avoided making the subject capital contribution, concealed such failure notwithstanding his office as treasurer and failed to give notice to himself of such failure and take other appropriate action (*see* ¶ 3 of Beatty affidavit). Since Beatty has no personal knowledge of the facts asserted, Beatty's knowledge is allegedly premised upon documentation drawn from a review of certain books and records by the plaintiff newly hired accountants. In separate affidavits submitted in opposition to the plaintiff's motion, two of the three "lender" shareholders neither deny nor admit the existence of their agreement to loan Darling the assessment moneys due under the 2003 call, the terms of which loan were set forth in the minutes of the March 24, 2003 shareholders' meeting. These two "lender" shareholders do, however, deny any and all knowledge of defendant Darling's purported non-payment of the 2003 capital call until it came "to light upon George Beatty's review of the capitalization of NCO [plaintiff] in 2012" (*see* ¶¶ 5 of the affidavits of Robert Mills and Steven Allison submitted in opposition). The plaintiff claims that these affidavits and its other submissions support the invocation

of the doctrine of equitable estoppel to prevent any finding that the plaintiff's claim Fifteenth cause of action is time barred. The plaintiff further contends summary judgment is precluded by issues of fact regarding who knew what and when with respect to Darling's duty failures. A denial of the injunctive and other relief demanded by the moving defendants on this motion is also alleged to be warranted due to procedural infirmities.

For the reasons set forth below, those portions of the instant motion wherein defendant Darling seeks summary judgment on the plaintiff's Fifteenth cause of action for a declaration that defendant Darling "is no longer a shareholder of NCO" is granted to the extent set forth below. The remainder of the relief requested on this motion is, however, denied.

Entitlement to summary judgment on substantive rather than procedural grounds by one against whom a claim for declaratory relief is posited is governed by same measure of proof as applied in any other action, namely, a proffer of proof in admissible form sufficient to demonstrate, as a matter of law, that the claimant's demand for declaratory relief without merit (*see* ***Zwarycz v Marnia Const., Inc***., 102 AD3d 774, 958 NYS2d 440 [2d Dept 2013]). Where such a motion is successful, dismissal of the declaratory judgment claim is improper, as the court is required to issue a declaration that is favorable to the movant rather than to the claimant (*see* ***200 Genesee St. Corp. v. City of Utica,*** 6 NY3d 761, 811 NYS2d 288 [2006]; ***Lanza v Wagner***, 11 NY2d 317, 340, 229 NYS2d 380 [1962], ***La Lanterna, Inc. v Fareri Enterprises, Inc***., 37 AD3d 420, 831 NYS2d 190 [2d Dept 2007]).

A six year statute of limitations governs actions sounding in breach of contract (see CPLR 213(2)). A claim that a shareholder breached an obligation imposed upon him or her under the terms of controlling agreement, such as a governing shareholders' agreement sounds, in breach of contract and is likewise governed by CPLR 213(2). Claims that a party breached a fiduciary owing by that party to another is governed by a six year statute of limitations in cases where allegations of fraud are essential to the claim and a three year statute governs where the relief sought sounds in tort for which money damages are principally demanded (*see* CLR 213(8); 214(3); ***Nichols v Curtis***, 104 AD3d 526, 962 NYS2d 98 [1st Dept 2013]; ***Carbon Capital Management, LLC v American Exp. Co.***,88 AD3d 933, 932 NYS2d 488 [2d Dept201]). A claim for declaratory relief is governed by the six year "catch all" period of limitations prescribed by CPLR 213(1) unless a more specific time period is applicable thereto because the facts underlying the claim could have been brought in the form of a different cause of action (*see* ***Fucile v L.C.R. Development, Ltd.***, 102 AD3d 915, 960 NYS2d 123 [2d Dept 2013]). Claims of fraud, which are neither pleaded nor otherwise before the court in this action, are governed by a six year limitations period or a two year discovery time limitation (*see* CPLR 213(8); 203(g); ***Sargiss v Magarelli***, 12 NY3d 527, 881 NYS2d 651 [2009]).

Here, the defendants' moving papers demonstrated that defendant Darling's majority ownership in the plaintiff was not unchallenged on the grounds of his breach of the shareholders' agreement from until February of 2013. It was then that the plaintiff issued a writing advising that Darling's shares had been deemed surrendered to the plaintiff due to an event that occurred more than

nine years prior, namely, his alleged failure to put up the cash required by a call of shareholders. That call was unanimously approved at a March 24, 2003 meeting of the shareholders as it was found necessary to pay a contractual obligation owing from the plaintiff to Darling. The moving papers further demonstrated that the plaintiff's claim of an effective ouster of Darling, which is advanced in its Fifteenth cause of action, is premised solely upon defendant Darling's purported breach of the obligation pay his share of the 2003 capital under the terms of a shareholders' agreement in effect upon the commission of the breach (*see* ¶ 111 of the Amended Complaint attached as Exhibit G to the moving papers; *see also* ¶¶ 41-51). Since the conduct constituting the breach of the shareholders' agreement that underlies the plaintiff's claim for declaratory relief allegedly occurred some nine years prior to the plaintiff's interposition of that claim, such claim and all others that are likewise premised are time barred under all applicable limitations period.

The retrospective conduct of the plaintiff in issuing the February 20, 2013 letter declaring Darling's forfeiture by a deemed surrender of his shares had no effect upon the time barred nature of the plaintiff's claims of a breach of the shareholders' agreement, irrespective of whether the facts constituting the breach are advanced as sounding in breach of contract, breach of fiduciary duties or declaratory judgment. The February 20, 2103 letter was thus ineffective to accomplish any valid or enforceable surrender by forfeiture or otherwise of defendant's Darling's ownership interest in the corporation. The moving defendants have thus established a prima facie entitlement to summary judgment in their favor on the plaintiff's Fifteenth cause of action due to the absence of any timely interposed, actionable claim of an effective loss or ouster of defendant Darling's 51% ownership interest in the plaintiff.

It was thus incumbent upon the plaintiff to rebut the moving defendants' prima facie showing of their entitlement to the partial summary judgment due to the running of the statute limitations. A review of the opposing papers submitted by the plaintiff reveals a failure to meet this burden as it failed to demonstrate that the moving defendants should be equitably estopped from asserting the statute of limitations defense.

It is now well settled law that the doctrine of equitable estoppel applies "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (***Simcuski v Saeli***, 44 NY2d 442, 449, 406 NYS2d 259 [1978]) and the plaintiff "demonstrates reasonable reliance on the defendant's misrepresentations (*see* ***Zumpano v Quinn***, 6 NY3d 666, 816 NYS2d 703 [2006]). To be successful, the party seeking to invoke the estoppel doctrine bears the burden of demonstrating that it was diligent in commencing the action "within a reasonable time after the facts giving rise to the estoppel have ceased to be operational" (***Simcuski v Saeli***, 44 NY2d 442, 406 NYS2d 259 [1978]; *see* ***Zumpano v Quinn***, 6 NY3d 666, *supra;* ***Marincovich v Dunes Hotels and Casinos, Inc.***, 41 AD3d 1006, 839 NYS2d 553 [3d Dept 2007]).

Where concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing a timely action, the plaintiff must demonstrate a fiduciary relationship exists, out of which, an obligation arises to inform the plaintiff of facts material to the underlying claim (*see*

General Stencils v Chiappa, 18 NY2d 125, 272 NYS2d 337 [1966]; ***Gleason v Spota***, 194 AD2d 764, 599 NYS2d 297 2d Dept 1993]). In cases like the instant one wherein a fiduciary duty is owing from the defendant, the plaintiff must establish that the defendant's failure to inform the plaintiff of material facts contributed to the delay in bringing the action ((*see* ***Zumpano v Quinn***, 6 NY3d 666, *supra*; ***Doe v Holy See***, 17 AD3d 793, 793 NYS2d 565 [3d Dept 2005]).

It is clear, however, that in all cases, the doctrine of equitable estoppel may not be properly invoked to toll a limitations statute where a plaintiff possesses "timely knowledge sufficient to place him or her under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable Statute of Limitations" (***Gleason v Spota***, 194 AD2d 764 *id.*, at 194 AD2d at 765; *see* ***Zumpano v Quinn***, 6 NY3d 666, *supra*; ***Rite Aid Corp. v Grass***, 48 AD3d 363, 854 NYS2d 1 [1st Dept 2008]). The party seeking the application of equitable estoppel must demonstrate a lack of knowledge of the true facts (*see* ***Pulver v Dougherty***, 58 AD3d 978, 871 NYS2d 495 [3d Dept 2009]), and that subsequent and specific actions by defendant somehow kept the plaintiff from timely bringing suit (*see* ***Putter v North Shore University Hosp***., 7 NY3d 548, 825 NYS2d 435 [2006]). The failure to do so renders a claim of estoppel without merit (*see* ***Giarratano v Silver***, 46 AD3d 1053, 847 NYS2d 698 [3d Dept 2007]).

Here, the record is devoid of evidence in admissible form sufficient to raise a genuine issue of fact regarding the existence of any lack of knowledge of true facts on the part of the plaintiff or of any subsequent acts of concealment or other failure by Darling to disclose material facts he had a duty to disclose which caused the plaintiff's failure to bring its claim in a timely manner. The plaintiff's claims of a lack of a knowledge of Darling's purported breach of are belied by the minutes of the March 24, 2003 shareholders' meeting, at which, a quorum of shareholders and directors were in attendance. At such meeting, Darling's disinclination to put up the cash required by call was addressed and remedied by the agreement to loan Darling his pro-rata cash assessment. The minutes of the March 24, 2003 shareholders' meeting reflect the terms of the Darling's loan from the lender shareholders, under which, the plaintiff, by its shareholders and directors, consented to an avoidance of a direct and immediate payment of the capital call by defendant Darling.

The existence and terms of those agreements are not denied by the plaintiff in its opposing papers and such terms relieved Darling of any obligation to pay until his shares or the company were sold. In addition, the capital call was necessitated by the plaintiff's failure to pay a $61,000.00 obligation owing to Darling, himself, which was more than his $31,000 pro rata share of call to pay it. Thus, any failure to directly pay, if not waived by the actions of the shareholders, constituted, at best, a mere technical breach of the shareholders' agreement. Any such breach would not warrant a forfeiture of Darlings' shares, as such forfeiture would, in effect, work a recision of his shareholders' agreement (*see* ***Eldridge v Shaw***, 99 AD3d 1224, 952 NYS2d 360 [4th Dept 2012]; ***Mortgage Electronic Registration Systems, Inc. v. Maniscalco***, 46 AD3d 1279, 848 NYS2d 766 [3d Dept 2007]; ***RR Chester, LLC v Arlington Bldg. Corp***., 22 AD3d 652, 803 N.Y.S.2d 100 [2d Dept 2005]).

Moreover, because the amended complaint, itself, does not refer to or raise any facts alleging the conduct relied upon to invoke the equitable estoppel doctrine, the plaintiff may not raise such

conduct in opposition to the instant motion (*see* ***Florio v Cook,*** 48 NY2d 792, 423 NYS2d 917 [1979]; ***Anderson Co. v Devine,*** 202 AD2d 382, 608 NYS2d 514 [2 Dept 1994]). For these reasons and those outlined above, the court finds that the plaintiff's claims and contentions are simply insufficient to warrant invocation of the doctrine of equitable estoppel so as to preclude the moving defendants from asserting their pleaded defense of statute of limitations (*see* ***Pursnani v Stylish Move Sportswear, Inc.***, 92 AD3d 663, 938 NYS2d 333 [2d Dept 2012]).

In view of the foregoing, the court hereby awards summary judgment to defendant Darling on the Fifteenth cause of action set forth in the amended complaint wherein the plaintiff seeks declaratory relief that Darling has no ownership interest in the plaintiff. Rather than dismiss the plaintiff's pleaded demand for such declaratory relief, the court hereby issues the following declaration in favor of the movants: Defendant Darling is hereby declared the owner of a 51% shareholder interest in the plaintiff and that the purported forfeiture by a surrender of his shares that was proclaimed in the plaintiff's February 20, 2013 letter is null and void and without effect. The court further declares that defendant Darling is entitled to possession of the capital stock shares reflecting his 51% ownership interest in the plaintiff and is entitled to exercise all of the rights and benefits attendant with such ownership.

Those portions of the instant motion by the defendants wherein they demand injunctive relief is denied as the same appears moot in light of the declaration issued herein, with respect to which, the plaintiff is bound to act accordingly. Also denied is the demand for an order directing the plaintiff to conduct a shareholder's meeting of the type contemplated by BCL 602(b), as no demonstrable right to such an order under that statutory provision or any other is apparent from the moving papers. Defendant Darling is free, however, to call for such meeting in accordance with any relevant corporate governance document so providing, and if so called, such meeting shall be duly scheduled and held by the plaintiff.

Pursuant to CPLR 3212(e), the Fifteenth cause of action set forth in the plaintiff's amended complaint is hereby severed from all others as the court's award of summary judgment in favor of the moving defendants by the terms of this order has disposed of such cause of action. The moving defendants may forthwith enter judgment thereon, accompanied by a copy of this order, reflecting the severance of the Fifteenth cause of action directed herein and the award of the summary declaratory judgment issued herein.

Dated: October 28 2013

THOMAS F. WHELAN, J.S.C.