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Docket: 1784CV02864-BLS2

Date: May 1, 2018

Parties: ERIC STONE, derivatively on behalf of TWIN COAST METROLOGY, INC. V. JASON REMILLARD and TWIN COAST METROLOGY, INC.

Judge: Kenneth W. Salinger Justice of the Superior Court

MEMORANDUM AND ORDER ON PLAINTIFF'S PARTIAL MOTION TO DISMISS COUNTERCLAIMS

Eric Stone and Jason Remillard each own half of a closely-held corporation called Twin Coast Metrology, Inc. (which the parties refer to as "TCM").

Remillard has asserted counterclaims for breach of fiduciary duty against Stone and TCM, for declaratory judgment as to whether Remillard resigned from his positions as Director and Treasurer of TCM, for indemnity against Stone and TCM as to certain alleged corporate debts, and for access to certain of TCM's books and records pursuant to G.L. c. 156D, § 16.02.

Stone has moved to dismiss the counterclaims for breach of fiduciary and for access to TCM's books and records. Stone does not move to dismiss the declaratory judgment or indemnity counterclaims.

The Court will dismiss the breach of fiduciary duty counterclaims against TCM. Under Massachusetts law, a corporation does not owe a fiduciary duty to its shareholders. See *Merola v. Exergen Corp.*, [423 Mass. 461](#), 463 n.3 (1996).^[1]

The Court will deny the motion to dismiss with respect to the breach of fiduciary duty counterclaims against Mr. Stone. Since Stone and Remillard are the

[1] Mr. Stone points out that in *Selmark Associates, Inc. v. Ehrlich*, [467 Mass. 525](#), 526 (2014), the Supreme Judicial Court affirmed a verdict in favor of a shareholder on his breach of fiduciary duty counterclaim against a corporation. But it appears that the issue of whether a corporation owes a fiduciary duty to its shareholders was never raised in *Selmark*, and the Court never overruled or even address its clear holding in *Merola* that corporations owe no such duty. As a result, *Selmark* does not hold that corporations owe a fiduciary duty to their shareholders. "The most that can be said is that the point was in the case [I if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass, 704, 719 n.12 (1990), quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925).

only owners of a closely held corporation, they owe each other "and the corporation itself ... a [fiduciary] duty of 'utmost good faith and loyalty'" and therefore "may not 'act out of avarice, expediency or self-interest'" toward each other. *Koshy v. Sachdev*, [477 Mass. 759](#), 772 (2017), quoting *Donahue v. Rodd Electrotype Co. of New England*, [367 Mass. 578](#), 593 (1975).

The facts alleged in support of Remillard's counterclaims plausibly suggest that Stone has tried to freeze out Remillard and deny him the benefits of his membership interest in TCM, all in breach of Stone's fiduciary duty to Remillard. See generally *Selmark Associates, Inc. v. Ehrlich*, [467 Mass. 525](#), 536 (2014). Part of Remillard's allegations, regarding Stone's purported attempt to shift corporate debts on a credit

card account to Remillard by not paying the bill and leaving Remillard on the hook as guarantor, may only support injunctive relief and not the award of money damages, at least at this point in time. But that is not grounds for dismissing the claims against Stone for breach of fiduciary duty.

Finally, the Court will also deny the motion to dismiss with respect to the counterclaim seeking access to TCM's books and records. Stone and TCM muster quite a few arguments as to which this claim should be dismissed. None is convincing.

Stone complains that Remillard did not ask "to inspect and copy" TCM records, as permitted under G.L. c. 156D, § 16.02, but instead wrote "to request the review or provision" of those records. The statute does not require the incantation of particular magic words, however. A request to "review" records is no different than a request to "inspect and copy" them. And the mere fact that Remillard said he would be happy if Stone instead provided copies of all the records, rather than having Remillard inspect them first, does not somehow make Remillard's request a legal nullity.

Stone next complains that Remillard must already have the corporate documents he is seeking. That is no basis for TCM denying its shareholder access to records covered by the statute, however.

The Court has reviewed Remillard's request for records and is satisfied that he made an adequate showing, consistent with § 16.02(0(1)-(3)), that he was requesting specified corporate records in good faith for the purpose of determining the current financial status of TCM, and that the records he requested are directly connected

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with that purpose. Stone and TCM, in contrast, have not established that TCM has determined in good faith that disclosure of the records sought would adversely affect the corporation in the conduct of its business, and thus are not entitled to invoke § 16.02(c)(4).

Stone and TCM also assert that they are trying to moot this claim by producing enough corporate information and records to satisfy Remillard. That is a fine thing. The parties should be able to resolve Remillard's right to access TCM's corporate records without further litigation. But an attempt to settle a claim is not a basis for dismissal of that claim.
ORDER

Plaintiffs partial motion to dismiss Counterclaims I, II, and V is ALLOWED IN PART and DENIED IN PART. It is allowed with respect to the counterclaims for breach of fiduciary duty against Twin Coast Metrology, Inc., which are hereby dismissed with prejudice. The motion is denied with respect to the counterclaims for breach of fiduciary duty against Eric Stone and for access to Twin Coast Metrology's books and records pursuant to G.L. c. 156D, § 16.02.

Kenneth W. Salinger Justice of the Superior Court

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