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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-4954-15

VERONA WAREHOUSING, INC., Plaintiff, -vs- **CAMECO, INC.,** Defendants.	CIVIL ACTION **ORDER GRANTING DEFENDANT/THIRD-PARTY PLAINTIFF CAMECO, INC.'S MOTION TO DISMISS PLAINTIFF VERONA WAREHOUSING, INC.'S COMPLAINT WITHOUT PREJUDICE**
CAMECO, INC., Third-Party Plaintiff, -vs- **RICHARD PERL,** Third-Party Defendant.	CIVIL ACTION

THIS MATTER having been opened to the Court by John Fialcowitz, Esq., the attorney for Defendant/Third-Party Plaintiff Cameco, Inc., for an Order to dismiss Plaintiff Verona

Warehousing, Inc.'s Complaint without prejudice for lack of authority to maintain this lawsuit, and the Court having considered the parties' submissions and for good cause shown,

IT IS on this the 29th day of April, 2016,

ORDERED as follows:

1. Cameco's motion to dismiss Plaintiff Verona Warehousing, Inc.'s Complaint without prejudice is GRANTED.

2. Mr. Fialcowitz shall serve a copy of this Order on all parties within 7 days.

Hon. Stephanie A. Mitterhoff, J.S.C.

This motion was: [✓] opposed.
[ ] unopposed.

Hon. Stephanie A. Mitterhoff, J.S.C.

For the reasons set forth in the Opinion, attached.

NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

VERONA WAREHOUSING, INC.,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
Plaintiff,	:	
v.	:	ESSEX COUNTY DOCKET NO.: ESX-L-4954-15
CAMECO, INC.	:	
Defendant	:	
CAMECO, INC.	:	
Third-Party Plaintiff,	:	
RICHARD PERL	:	
Third-Party Defendant.	:	

Dated: April 29, 2016

By: Stephanie A. Mitterhoff, J.S.C.

STATEMENT OF FACTS

This matter arises from a dispute between two closely-held, family corporations. Plaintiff, Verona Warehousing, Inc. ("Verona") is owned, 50-50, by Richard Perl and his brother Jerome Perl. Defendant, Cameco, Inc., is also owned, 50-50, by Richard Perl and his brother Jerome Perl. Accordingly, Richard and Jerome Perl are equal 50% owners and directors of both Verona and Cameco, with equal voting rights. Cameco has its principal place of business at 100

Pine Street, Verona, NJ. It is engaged in the business of slicing, packaging and selling ham and turkey luncheon meat items to top supermarket chains under their branded names. Verona is a separate corporation, however it does not maintain a place of business separate and apart from Cameco and the Cameco facility. Verona does not employ anyone, does not pay salaries and does not conduct business of any kind other than to collect rent from Cameco and a house adjoining the Cameco facility. Verona is the sole owner of the premises and Cameco is the sole tenant. Cameco has paid a monthly rent of $16,700.00 pursuant to a lease between both corporations.

Paragraph 3 of the Verona Shareholder Agreement, entitled "MANAGEMENT OF THE CORPORATION," provides in its entirety as follows:

> 3.1 Each shareholder shall vote his shares so as to elect the Shareholders as directors of the Corporation. Each Shareholder shall continue as a director of the Corporation for so long as he continues to own any shares of stock of the Corporation.
>
> 3.2 In the event that a Shareholder sells or otherwise disposes of his entire stock interest in the Corporation, he shall immediately resign as a director of the Corporation as of the date of such sale.

Cameco, by way of Jerome Perl, alleges that starting in 2012 its business suffered a significant financial downturn and began experiencing losses. Between February 23, 2013 and August 26, 2015, Jerome Perl allegedly loaned Cameco a total of $1,100,000.00 of his own funds to help it through its cash flow crisis and to stay in business. That loan has not been paid back and is currently in default. In addition, Cameco owes approximately $800,000.00 to its pension plan. Verona, by way of Richard Perl, disputes the claim that Cameco has been undergoing a cash flow crises and that it cannot afford to pay rent. Verona argues that such a claim is belied

by the fact that as recently as February 1, 2016, Cameco allegedly has $734,812.00 in its bank accounts.

Verona, by way of Richard Perl, has sued Cameco, alleging that Cameco has wrongfully ceased paying rent to Verona since July 2014. Verona also alleges that Cameco has wrongfully removed Verona and the premises from its insurance policies. Cameco has filed a third party complaint against Richard Perl individually, alleging that Richard filed Verona's lawsuit against Cameco over Jerome's objection and in violation of his fiduciary duties and duty of loyalty to Cameco.

DISCUSSION

I. The Motion to Dismiss Standard

Cameco's motion is governed by R. 4:6-2(e), which states:

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs...(e) failure to state a claim upon which relief can be granted.

Trial courts should dismiss claims pursuant to R. 4:6-2(e) "in only the rarest of instances." NCP Litigation Trust v. KPMG LLP, 187 N.J. 353, 364 (2006) (internal quotes and citation omitted). "A court's review of a complaint is to be undertaken with a generous and hospitable approach, and the court should assume that the nonmovant's allegations are true and give that party the benefit of all reasonable inferences." Ibid. Furthermore,

> A complaint should not be dismissed under [R. 4:6-2(e)] where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. [Rieder v. State, 221 N.J. Super. 547, 552, 535 (App. Div. 1987).]

"It has long been established that pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit." Glass v. Suburban Restoration Co., Inc., 317 N.J. Super. 574, 582 (App. Div. 1998). See also Ayala v. N.J. Dep't of Law & Pub. Safety, 2011 N.J. Super. Unpub. LEXIS 2663 (App. Div. 2011) (stating that courts shall not accept complaints that plead "bald accusations, unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations.").

II. Authority to Institute the Instant Lawsuit

In moving to dismiss the complaint, Cameco argues that Richard lacks the authority to maintain this action in the name of Verona, because Jerome, an equal 50% owner and director of Verona, opposes and objects to this lawsuit. There is, therefore, deadlock between the directors relating to the decision to bring the instant lawsuit. Accordingly, Cameco argues that the appropriate procedural vehicle for Richard to pursue is either filing a shareholder's derivative lawsuit or resorting to the Minority Shareholder Oppression Statute. Verona opposes this argument, asserting that because collecting rent from Cameco was a part of its normal course of business as the landlord, its lawsuit seeking unpaid rent must be considered a necessary business decision, which its president was authorized to make. Verona thus argues that Richard, as president, did not need authorization from its conflicted director (Jerome), to commence the instant suit.

It is a fundamental principle of the law of corporations that "[t]he business and affairs of a corporation shall be managed by or under the direction of its board, except as in this act or in its certificate of incorporation otherwise provided." N.J.S.A. 14A:6-1. Consequently, the management of corporate affairs "is committed by law to the directors assembled in board meeting, and it is generally to be understood that an officer, such as the president or treasurer,

has no more authority over the corporate property than any other director." Gabriel v. Auf Der Heide-Aragona, Inc., 14 N.J. Super. 558, 567 (App. Div. 1951). "The act of a president or other officer, unless it is shown to pertain to his official duty, or is within the express or implied scope of his employment derived from the board of directors, is not regarded as the act of the corporation." Id.

In support of its argument that Richard does not have the authority to maintain this lawsuit on behalf of Verona on his own, Cameco cites to the seminal case of Sterling Indus. v. Ball Bearing Pen Corp., 298 N.Y. 483, 491-92 (1949). In Sterling, the New York Court of Appeals faced the precise issue at hand, namely, whether a corporation's president could commence a lawsuit after a majority of the corporation's board of directors refused to authorize it. The plaintiff corporation was formed by two groups of men who were to share equally in its control. One group was made up of representatives of the defendant corporation, Ball Bearing Pen Corporation ("Ball Bearing"). The other group consisted of three men, one of whom was later elected the president of the plaintiff corporation. The by-laws of the plaintiff corporation provided that the affairs and business of the corporation were to be managed by a board of directors of four members and that a majority of the board were to constitute a quorum. The by-laws also provided that each director would have one vote, and that a majority of votes was required in order to constitute an act on behalf of the board. As part of its business, the plaintiff corporation had entered into a contract with Ball Bearing, who, as previously mentioned, had representatives who were directors on the plaintiff corporation's board.

The president of the plaintiff corporation gave notice of a special meeting of the board of directors to consider and act upon various matters including the institution of a lawsuit or other proceedings against the Ball Bearing Corporation for breach of contract. Two directors voted in

favor of the motion to institute the lawsuit and two voted in opposition. Thus, there being no majority vote in favor of bringing the suit, the motion was denied. Nevertheless, the president of the plaintiff corporation instituted suit, in the name of the corporation, against Ball Bearing for breach of contract.

In deciding whether the president of the corporation had the authority to institute the lawsuit without majority approval from the corporation's board of directors, the Court of Appeals first recognized that Section 27 of New York's General Corporation Law provides that the business of a corporation shall be managed by its board of directors. Id. at 490. It also recognized that Section 60 of the Sock Corporation Law provides that the directors may appoint or elect a president, "who shall respectively have such powers and perform such duties in the management of the property and affairs of the corporation, ***subject to the control of the directors, as may be prescribed by them or in the by-laws***" [emphasis added by the court]. Id. The Court stated that whether a corporation should seek to institute a lawsuit is a business decision, and therefore one ordinarily "left to the discretion of the directors, in the absence of instruction by vote of the stockholders." Id. Turning to the circumstances at hand, due to the fact that the by-laws required majority director vote to act, the Court swiftly concluded that the president did not have the authority to institute the lawsuit. Id. at 491. In support of its conclusion, the Court noted, "the parties intended that the corporation should be managed by its board of directors and that the board should take no affirmative action if not sanctioned by a majority." Id. Thus, the Court in no ambiguous terms rejected the president's conduct in the face of a deadlock amongst the directors, stating, "[t]he fact that a deadlock may result does not necessarily mean that the present law is inadequate and that it should be remedied by the approval of presidential power where none in fact exists – thus disregarding fundamental rules of

agency law." Id. The Court went on to state that the solution to the problem facing the group in favor of filing suit, and the appropriate remedy, was a stockholder's derivative action. Id. at 492.

The Court also discussed the argument made by the plaintiff corporation that it was permitted to file the lawsuit because it was an emergency or a critical situation. The Court rejected the argument, concluding that no evidentiary facts were alleged to indicate a crises was at hand or that immediate or vital injury was threatening the plaintiff corporation. In that regard, the Court appeared to require facts to "indicate that its corporate existence is threatened or that its business will not continue normally," in order for such an "emergency and/or critical situation" argument to succeed. Id. at 493. The Court concluded its opinion by concurring with the dissenting opinion from the lower court, which stated, "[o]ne side should not be entitled to maintain an action in the name and at the expense of the corporation simply because the president happens to be allied with its interests." Id.

Although a New York case, Cameco asserts that Sterling is consistent with New Jersey's current business corporation law. In that regard, Cameco submits that under N.J.S.A. 14A:6-1, the business and affairs of a corporation are managed by or under the direction of its board, and "any action approved by a majority of the votes of directors present at a meeting at which a quorum is present shall be the act of the board or of the committee, unless this act, or the certificate of incorporation or the by-law requires a greater proportion, including a unanimous vote." N.J.S.A. 14A:6-7.1(4). In the event of a deadlock, Cameco asserts, New Jersey law provides for a shareholder derivative action under Rule 4:32-5 and resort to N.J.S.A. 14A:12-7, the Minority Shareholder Oppression Statute.

The court finds the Sterling case to be persuasive authority and concludes that Richard Perl did not have the authority to commence the lawsuit without majority approval from the

corporation's board of directors. Beyond the markedly similar factual circumstances present in Sterling, Cameco has also shown that the legal principles and conclusions of law made by the New York Court of Appeals in the decision are consistent with New Jersey's current business corporation law. Turning to the facts of the case at hand, it is undisputed that Verona's by-laws provided for equal voting rights for its sole directors, Richard and Jerome, and a majority director vote was required to act on behalf of the corporation, which includes instituting the instant lawsuit. Because it has been shown that no such majority was procured prior to filing the suit, the action was not allowed to be commenced as it was. The court also notes that Richard has failed to submit any evidence or even argue that instituting the lawsuit was necessary due to an emergent or critical situation. Rather, it is clear that the matter before the court is a dispute over unpaid rent and, to a greater extent, a dispute between feuding brothers. No circumstances exist which might permit Richard to continue this action under the emergency exception articulated in Sterling.

Verona argues that Sterling is distinguishable because the basis for that lawsuit, an alleged breach of contract, was outside the normal course of business for the plaintiff corporation. In that regard, Verona asserts that, as the landlord, commencing this lawsuit to recover rent from Cameco is within its normal course of business, which, it argues, permitted its president to act under either apparent or implied authority. Verona cites to various authorities in support of this proposition, including Gabriel v. Auf Der Heide-Aragona Inc., 14 N.J. Super. 558 (App. Div. 1951) and Lee v. Jenkins Bros., 268 F.2d 357 (2nd Cir. 1959), which the court will discuss.[1] In Gabriel, the Appellate Division discussed the doctrines of implied and apparent

[1] Verona also cites to Miller & Dobrin Furniture Co. v. Camden Fire Ins. Co., 55 N.J. Super. 205 (Law Div. 1959). That case involved a fire to a corporation's store and the issue for the court was whether the corporate veil could be pierced in order to ban the corporation from recovering from various insurance companies, due to the fact that an officer/director of the corporation had allegedly intentionally started the fire. Verona cites this case for the

authority, specifically relating to the authority of a corporation's treasurer to bind the corporation. Regarding implied authority, the court stated that the act of an officer, unless it is shown to pertain to his official duty, or is within the express or implied scope of his employment derived from the board of directors, is not regarded as the act of the corporation. Gabriel, supra, 14 N.J. Super. at 567. In the absence of any evidence that conferred special authority to the treasurer by way of the corporation's by-laws or action of the shareholders or directors, the court concluded that the treasurer did not have the express or implied authority to bind the corporation. Regarding apparent authority, the Gabriel court noted, "where an officer of a corporation has been permitted by the board of directors to manage the corporate affairs, his authority to represent the company may be implied from the manner in which he had been so allowed to transact the business." The apparent authority to bind the corporation, the court continued, came from the officer's previous similar transactions with the knowledge and consent of the board. Id. at 569. Accordingly, the test articulated by the court was whether "a person of ordinary prudence, conversant with business usages and the nature of the particular transaction, would be justified ***by reason of the principal's acts*** in presuming the requisite agency" [emphasis added]. Id. at 570. In concluding that the treasurer had failed to satisfy the test, the court noted that his case was "erected almost entirely" upon the statements and conduct of himself, noting that it is "elementary that agency cannot be proved merely by the extra-judicial declaration of the person whose agency is sought to be established." Id.

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proposition, "when the board of directors abandons control of the affairs of the corporation to one officer or manager his act will be considered the act of the corporation and binding upon it." Not only are the facts of Miller inapposite, Verona has not provided any evidence, beyond counsel's self-serving statements in its brief, to show that its board had abandoned control of the affairs of the corporation to Richard Perl such that his action in bringing this lawsuit is binding upon Verona.

Here, Richard Perl has failed to satisfy the test articulated by the Gabriel court to show he had the express, implied and/or apparent authority to bring the instant lawsuit. First, it has not been shown that Richard was given any special authority in Verona's by-laws or by way of shareholder or director action. Rather, it is undisputed that the by-laws provide for equal voting power between Richard and Jerome, the only two directors of the corporation. Accordingly, there was no express or implied authority for Richard to bring this lawsuit. Moreover, Richard has failed to show that he had the apparent authority to file this suit. First, Richard has failed to show that he has ever filed a lawsuit on behalf of Verona. This fact belies Richard's argument that filing the instant lawsuit is part of Verona's ordinary business conduct. Second, even if Richard has filed lawsuits in the past, no evidence has been submitted to show knowledge and consent of same from Verona's board. In that regard, Richard has couched his argument almost entirely on his own statements and conduct rather than evincing the existence of his authority to act through the knowledge and consent of the board. This was precisely why the Appellate Division rejected the treasurer's apparent authority argument in Gabriel.

The relevant issue in the other case cited by Verona, Lee v. Jenkins Bros., supra, 268 F.2d 357, was whether the president of a corporation had the authority to enter into an oral contract with an employee relating to pension payments. There, the Second Circuit noted, "the rule most widely cited is that the president only has authority to bind his company by acts arising in the usual and regular course of business but not for contracts of an 'extraordinary' nature." Id. at 365. The court noted the scarcity of authority which identifies "extraordinary" agreements before focusing on the more precise area of employment contracts. Thus, it appears Verona cites to Lee for the proposition that Richard had the authority to bring the instant lawsuit because it was within the usual and regular course of business and, therefore, Richard had the authority to

file the lawsuit as the corporation's president. The court is not persuaded by this argument largely for the reasons discussed above. To reiterate, Richard has failed to evince or persuade the court that filing a lawsuit to recover past rent is within the ordinary and normal course of business for Verona, such that Richard's conduct could be deemed authorized by implied or apparent authority. Moreover, Lee is inapposite to the facts at hand because in this case a lawsuit was filed, in contrast to an agreement being entered into and, most importantly, there has been an objection to the president's action in the instant matter, whereas no such objection from the board of directors was present in Lee.

Regarding the third party complaint filed by Cameco against Richard Perl, it follows that that action was also not authorized. Although Richard Perl briefly raises this point in moving to dismiss Cameco's complaint, his brief largely argues that the complaint is precluded by a settlement agreement requiring arbitration and because the claims are not related to Verona's lawsuit against Cameco. Nevertheless, the court concludes that because it is clear that one of Cameco's board members objects to filing this third party complaint on its behalf, Jerome Perl did not have the authority to do so on his own.

CONCLUSION

For the foregoing reasons, the court concludes that both of these actions were not properly brought by either party. Rather than dismissing the complaints, however, Verona shall amend its complaint to plead a shareholder's derivative cause of action.