

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ARNOLD H. LICHTENSTEIN,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 95-34-P-C
)	
CONSOLIDATED SERVICES GROUP,)	
INC.,¹ et al.,)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON DEFENDANTS’
MOTIONS FOR SUMMARY JUDGMENT**

This consolidated action arises out of the plaintiff’s alleged ouster from a close corporation in which he and two of the defendants were officers, directors, shareholders and employees, and out of the officer-defendants’ alleged misappropriation of corporate assets. In an individual complaint (Civ. No. 95-34-P-C) the plaintiff asserts breach-of-contract claims against the officer-defendants, John Salterio and Peter Butera, and a claim against Salterio for refusal to permit inspection of the corporate books and records in violation of 13-A M.R.S.A. § 626. He also asserts claims for appointment of a receiver, dissolution and liquidation of the defendant corporation pursuant to 13-A M.R.S.A. §§ 1115(1)(D), (1)(E) and 1123(3)(E). Finally, he asserts a breach-of-fiduciary-duty claim

¹ On May 3, 1995 this court ordered that defendant Consolidated Services Group, Inc. shall not be required to take any further action in this matter until further court order, that any final judgment in this matter shall be binding on the corporation, and that any final judgment on any matter relating to the corporation shall be binding on any and all other parties in this case in any and all capacities. Order Staying Proceedings Against Defendant Consolidated Services Group, Inc. (Docket No. 18).

against Jonathan Fryer, Esq., the attorney who formed the defendant corporation and was trustee of the shareholders' voting trust. Additionally, in a shareholder derivative complaint (originally filed as Civ. No. 95-170-P-C)² the plaintiff asserts claims for breach of fiduciary duty and unjust enrichment against Salterio and Butera, and a claim for appointment of a receiver. Salterio, Butera and Fryer move for summary judgment on all counts of both complaints. For the reasons set forth below, I recommend that Salterio's and Butera's motion be granted in part and denied in part, and that Fryer's motion be granted in its entirety.

I. Background

Viewed in the light most favorable to the plaintiff, the summary judgment record reveals the following material facts: From 1980 or 1981 until 1986 defendant John Salterio was employed by a company called Coffee Pause, a Massachusetts company that purchased and redistributed packaged coffee and provided related products and services. Deposition of John G. Salterio ("Salterio Dep.") at 18-19. Sometime between 1982 and 1985 the plaintiff became a Coffee Pause salesperson, working indirectly for Salterio. *Id.* at 30-31. Salterio left Coffee Pause in 1986 to start his own company in Philadelphia, Pennsylvania called Caribbean Coffee Company, which performed essentially the same functions as Coffee Pause. *Id.* at 20-21.

In about mid-1988 the plaintiff and Salterio started a business called Consolidated Services Group ("CSG"), which distributed coffee and bottled water. *See* Salterio Dep. at 37, 40, 143-44; Deposition of Arnold H. Lichtenstein taken May 1, 1995 ("Lichtenstein Dep. I") at 9-10. CSG was

² On June 13, 1995 this court ordered that Civ. No. 95-170-P-C be consolidated with Civ. No. 95-34-P-C for all purposes. Order on Motion to Consolidate (Docket No. 25).

a partnership in which the plaintiff and Salterio owned 49% and 51% interests, respectively. Lichtenstein Dep. I at 13. Their understanding was that Salterio would provide the capital, handle the books and run the company, the plaintiff would do the sales work, and they would share the profits equally. *Id.* at 12-13.

At some point the plaintiff and Salterio decided to take in other people, Martin Keefe³ and defendant Peter Butera,⁴ to form a corporation. Lichtenstein Dep. I at 10. For a very short time Butera and Keefe were members of the partnership. *Id.* at 15-16. Keefe expressed concern, *inter alia*, about working for Salterio and letting Salterio be in charge of the business. *Id.* at 20. Keefe conditioned his joining CSG on having a written contract that protected himself and the plaintiff. *Id.* at 21. It was Keefe's responsibility to create the contract to form the corporation. *Id.* at 16.

Sometime in 1989 Keefe asked defendant Fryer to draft an agreement and "do" an incorporation. Deposition of Jonathan P. Fryer ("Fryer Dep.") at 12. Keefe told Fryer generally what was supposed to go into the agreement, and Fryer viewed himself as a scrivener whose responsibility was to place that information in a form and create the corporation. *Id.* at 13. At some point Keefe presented a draft incorporation agreement to the plaintiff, Salterio and Butera. Lichtenstein Dep. I at 25-26. Over the course of approximately twenty hours, covering a period of three days, the group discussed the terms, including remuneration and share distribution, that were ultimately set forth in the Corporate Formation Agreement. *Id.* at 26. They also discussed each person's prospective duties in the corporation. *Id.* at 27. The plaintiff was to be responsible for

³ Keefe also worked at Coffee Pause with the plaintiff and Salterio, and was a minority owner of Coffee Pause. Lichtenstein Dep. I at 21.

⁴ Butera is Salterio's father-in-law. Salterio Dep. at 143.

sales, sales training, finding new accounts and finding a coffee roaster, bottlers and suppliers. *Id.* Salterio was to be their “internal specialist broker,” Keefe their salesperson, and Butera their telemarketing expert. *Id.* Finally, the group discussed the terms of their employment agreement. *Id.* at 28. The parties met again a few weeks later and spent approximately twenty more hours discussing redrafted as well as newly drafted documents involved in the incorporation process. *Id.* at 31-32. Finally, the parties spent several hours in a third meeting going over the documents line-by-line before they signed them. *Id.* at 34.

On April 4, 1989 the plaintiff, Salterio, Butera and Keefe executed an agreement to form a Massachusetts or Delaware corporation to be called Consolidated Services Group, Inc. (“CSG, Inc.” or “the corporation”). Corporate Formation Agreement, Exh. 1 to Lichtenstein Dep. I. The agreement noted that the parties’ individual capital contributions would be set forth in Exhibit A, but Exhibit A was left blank. *Id.* at Art. II & Exh. A. The shareholders orally agreed that Salterio would contribute all of the money necessary to capitalize the corporation, Lichtenstein Dep. I at 148-49, as he had done in the preexisting partnership.

The four incorporators also executed an Original Incorporators Voting Trust (“Voting Trust”), agreeing to deliver their shares to Fryer as voting trustee. Voting Trust, Exh. 2 to Lichtenstein Dep. I. The Voting Trust provided that Fryer’s sole obligation as voting trustee was to cast the vote of each share of stock as directed in writing by the respective shareholder. *Id.* at Art. VI.

Finally, the incorporators executed an Initial Employment Agreement of Incorporators of Consolidated Services Group, Inc. (“Employment Agreement”), Exh. 3 to Lichtenstein Dep. I. The four employee-incorporators agreed, *inter alia*, that at the first meeting of the Board of Directors and

Stockholders of the corporation they would vote to adopt and ratify the Employment Agreement, at which time the corporation would become a party to the agreement. *Id.* at 1. The agreement provided that the corporation could terminate any employee without cause upon thirty days written notice. *Id.* at 2. It also set each employee's initial weekly salary and a formula for determining salary increases. *Id.* at 5-6. The agreement contained a restrictive covenant prohibiting any employee, for three years following termination of his employment, from participating in any business similar to that conducted by the corporation at the time of termination within a 150-mile radius of the corporate headquarters. *Id.* at 8.

Although the Corporate Formation Agreement provided for a Massachusetts or Delaware corporation, the shareholders agreed to incorporate in Maine, where Salterio resided. Lichtenstein Dep. I at 38. Articles of Incorporation were filed with the Maine Secretary of State for Consolidated Services Group, Inc. on September 12, 1989, naming Salterio, the plaintiff, Keefe and Butera as the corporation's four directors. Articles of Incorporation, Exh. 4 to Lichtenstein Dep. I. The directors voted, by unanimous written consent, to elect Salterio President and Clerk, Butera Treasurer, Lichtenstein First Vice President and Keefe Second Vice President. CSG, Inc. Action taken by unanimous written consent of all directors without meeting, Exh. 27 to Salterio Dep. The corporation issued 51 shares of stock to Salterio, 28 to the plaintiff, 15 to Keefe and 6 to Butera. Stock Certificates 1 through 4, Exh. 23 to Fryer Dep. In accordance with the Voting Trust, each stockholder transferred his shares to Fryer, the voting trustee. *Id.*

The corporation never formally voted to adopt and ratify the Employment Agreement. *See* Deposition of Arnold H. Lichtenstein taken June 26, 1995 ("Lichtenstein Dep. II") at 64-65. The plaintiff does not recall asking for a vote of the shareholders or directors to adopt the Employment

Agreement. *Id.* Salterio told the plaintiff that “everything was taken care of,” and the plaintiff thought that the Employment Agreement was adopted at the first meeting of incorporators. *Id.*

No assets of the pre-incorporation business, CSG, were ever formally transferred to the corporation. Salterio Dep. at 137-38. The four shareholders never held a meeting where they sat down to take action as shareholders. *Id.* at 137. The corporation never filed a tax return or paid corporate filing fees to the state of Maine. *Id.* Its authority to do business was suspended on September 13, 1991 as a result of its failure to file an annual report as required by 13-A M.R.S.A. § 1301. First Amended Complaint (Docket No. 27, Civ. No. 95-34-P-C) ¶ 4; Answer of Peter Butera and John Salterio to First Amended Complaint (Docket No. 31) ¶ 4. The business has referred to itself at various times as Consolidated Services, Consolidated Services, Inc., Consolidated Services Group, and Consolidated Services Group, Inc. Salterio Dep. at 135-36. From November 9, 1989 to August 7, 1990 Salterio wrote checks from an account in the name of Consolidated Services Group, Inc. *Id.* at 16-17 & Exhs. 12 (check register) & 13 (blank checks).

In January 1990 Salterio, signing as president of the corporation, executed a Master Agreement between New England Coffee Company and CSG, Inc. (“New England Coffee Agreement”), Exh. 6 to Lichtenstein Dep. I. Salterio concedes that the corporation existed at this point, and that the corporation itself entered into the contract. Salterio Dep. at 43. The Consolidated business has generated eighty percent or more of its income from coffee sales, which come primarily from the coffee brokerage contract with New England Coffee Co. Salterio Dep. at 114. The operating statements for the Consolidated business show that commissions from the New England Coffee Agreement constituted 89.41% of its total sales for 1994, and 85.38% of its total sales for 1993. Consolidated Services 1994 Operating Statement at 3 (unnumbered page), Exh. 7 to Salterio

Dep.; Consolidated Services 1993 Operating Statement at 4 (unnumbered page) Exh. 8 to Salterio Dep. For the tax years 1989 through 1993 Salterio has included income and expenses from the Consolidated business on Schedule C (Profit or Loss from Business or Profession) of his personal federal income tax return. Salterio Dep. at 10-11.

Sometime before November 1990, Salterio terminated Keefe because he failed to perform his duties. Lichtenstein Dep. I at 52-53. At that time Salterio owed Keefe approximately two thousand dollars. Salterio Dep. at 47. Salterio “conversed with Jonathan Fryer and . . . agreed to . . . pay the \$2,000 and write on the check, purchase of stock, and that stock would come back into the corporation.” *Id.*

In approximately November 1990 Salterio and Mr. Flowers, Consolidated’s accountant, told the plaintiff there was no money to pay him. Lichtenstein Dep. I at 59, 62-63. Salterio told the plaintiff that he could work in the same field as the corporation, provided that he paid the corporation twenty percent of what he earned. *Id.* at 64. Otherwise, he could not do any work that conflicted with Consolidated’s business, although Salterio said he would not object to the plaintiff’s performing consulting work. Lichtenstein Dep. II at 23-24. The plaintiff later told Salterio and Butera that he could not work for no money, and that he was leaving the business. Lichtenstein Dep. I at 67.

On October 31, 1990 the plaintiff’s attorney wrote to Salterio concerning a proposed agreement wherein the plaintiff would have resigned as vice president and conveyed all of his interest in the corporation back to the corporation, and the plaintiff would have the right to solicit the corporation’s customers with respect to marketing and sales programs. *See* Letter dated Oct. 31, 1990 from Alan S. Biernbaum, Esq. to Salterio, Exh. 15 to Lichtenstein Dep. II; Letter dated Jan. 8, 1991 from attorney Biernbaum to plaintiff, Exh. 17 to Lichtenstein Dep. II; Agreement (unexecuted

draft), Exh. 18 to Lichtenstein Dep. II. Salterio testified that, in late 1990 or early 1991, after receiving a letter from the plaintiff's attorney, he discussed with Fryer the plaintiff's departure from the business. Salterio Dep. at 85-86.

In a letter dated May 16, 1991 and written at the request of Salterio, voting trustee Fryer informed the plaintiff that "neither [the plaintiff], Mr. Salterio, or the other stockholders ever completed the necessary documentation to complete the establishment of the corporation or its business. . . . It is and has been for sometime my opinion that the corporation never fully came into operation and was abandoned as a venture by the stockholders." Exh. 7 to Lichtenstein Dep. I.

On November 29, 1994 the plaintiff's attorney wrote to Salterio, as clerk of CSG, Inc., to request inspection of the corporate books and records. Exh. 8 to Lichtenstein Dep. I. Salterio responded: "Based upon the material facts as I understand them, I am unable to comply with your request to inspect the records of the corporation. CSG, INC., never had any assets, liabilities, net worth, or meeting minutes. Because the corporation never operated as such, there are no corporate records." Letter dated Dec. 3, 1994 from Salterio to Ralph Dyer, Esq. at 2, Exh. 9 to Lichtenstein Dep. I.

On January 30, 1995 the plaintiff filed his original complaint, Count I of which alleged that Salterio refused to permit inspection of the corporate books and records. Complaint (Docket No. 1, Civ. No. 95-34-P-C) ¶¶ 41-44. On March 20, 1995 Salterio's attorney wrote the plaintiff's attorney as follows: "I am continuing to gather [records]. They are not, *with some exceptions*, corporate records, but rather the records of Consolidated which existed prior to incorporation as a dba of Mr. Salterio and continued in that fashion after incorporation." Final Exh. (unnumbered) at 1 (emphasis added), to Statement of Undisputed Material Facts of Peter Butera and John Salterio

(Docket No. 53).

II. Legal Analysis

A. The Corporation

The corporation's legal existence began on September 12, 1989, the date on which the Articles of Incorporation were endorsed as filed with the Secretary of State. 13-A M.R.S.A. § 406(2). Nevertheless, defendants Salterio and Butera argue that CSG, the business that existed before the corporation was formed,⁵ never became the property of the corporation. Alternatively, they argue that if the business did become the property of the corporation, the corporate form should be disregarded.

The plaintiff and Salterio decided to “take in other people, Mr. Butera and Mr. [Keefe], to form a corporation.” Lichtenstein Dep. at 10. The future shareholders spent over forty hours discussing the terms of what became the Corporate Formation Agreement and Employment Agreement. The corporation was to carry on essentially the same business as CSG and had the same employees.

From these facts one can reasonably infer that the parties agreed not simply to form a corporation called CSG, Inc., but to incorporate the preexisting business enterprise known as CSG. Indeed, CSG used a checking account in the name of Consolidated Services Group, Inc. nearly a year before the corporation existed. Check No. 1053, Exh. 28 to Salterio Dep. Even if the assets of CSG

⁵ Salterio argues that this business was his sole proprietorship, but the plaintiff testified that it was a partnership. The legal status of the pre-incorporation business is irrelevant to my recommended decision.

were not transferred to the corporation at the outset, the corporation itself entered into the New England Coffee Agreement, which generated approximately eighty percent of the business's income.

Second, Salterio and Butera argue for “reverse” piercing of the corporate veil.⁶ “[C]ourts have been reluctant to disregard the legal entity of corporations and will do so with caution and only when necessary in the interest of justice.” *Brennan v. Saco Constr., Inc.*, 381 A.2d 656, 662 (Me. 1978). Similarly, courts do not ignore the corporate entity “in order to allow a shareholder to avoid the burdens of incorporation.” *LaBelle v. Crepeau*, 593 A.2d 653, 655 (Me. 1991). In this case, Salterio and Butera voluntarily joined with the plaintiff and Keefe to do business in the corporate form. The summary judgment record does not support a finding that it is necessary in the interest of justice to disregard that form. *See Fletcher Encyclopedia of Private Corporations* § 41.70 at 707 (“[T]he better rule would seem to be that a person who has voluntarily adopted the corporate form to engage in business is precluded from asking court to disregard that form merely because the person is disadvantaged by its use.”).

B. The Individual Complaint

1. Count I (Refusal to Permit Inspection of Corporate Books and Records)

In Count I the plaintiff alleges that Salterio, as the representative of CSG, Inc., refused to

⁶ Reverse-piercing cases usually involve “a corporate insider, or someone claiming through such individual, attempting to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same.” *Fletcher Encyclopedia of Private Corporations* § 41.70 at 706-07 (1990).

permit the plaintiff to inspect the corporation's books and records.⁷ Shareholders⁸ such as the plaintiff have the "right to inspect during normal business hours . . . the corporation's books and records of account, minutes of meetings, and list or record of shareholders." 13-A M.R.S.A. § 626(2). Salterio represented to the plaintiff in his December 3, 1994 letter that there were no corporate books and records because the corporation never operated. If no books and records existed, then Salterio's statement was not a refusal of the right to inspect. However, the March 20, 1995 letter from Salterio's counsel suggests that at least some corporate records existed. Because the letter does not particularly identify them, it is impossible to discern whether they had already been disclosed to the plaintiff. Accordingly, triable issues of fact preclude summary judgment for Salterio and CSG, Inc. on Count I.

Salterio argues that the plaintiff is entitled to no damages because he expended no costs in obtaining access to the corporate books and records. However, after Salterio's alleged refusal on December 3, 1994, the plaintiff filed suit seeking an order permitting inspection. Salterio has not shown that, as a matter of law, the plaintiff is not entitled to the recovery of costs, including "such reasonable expenses and attorney's fees as he incurred in bringing the proceeding" seeking an order directing the inspection. 13-A M.R.S.A. § 626(5)(C).

Section 626(5)(C) also authorizes punitive damages "if the court finds that the refusal to permit inspection was in bad faith." *Id.* "Bad faith" means the lack of honesty in fact or, in the case

⁷ Because none of the plaintiff's allegations related to this claim involve Butera, he is entitled to summary judgment on Count I.

⁸ "Any person . . . who hold[s] voting trust certificates representing shares aggregating at least 10% of the outstanding shares of that class," or such a person's attorney, is a "shareholder" for purposes of 13-A M.R.S.A. § 626. *Id.* § 626(1)(C), (D).

of a corporate officer or director, the failure to make reasonable inquiry into the facts or exercise reasonable business judgment. 13-A M.R.S.A. § 102(14). The summary judgment record reflects that Salterio and the other three incorporators intended to form a corporation; that they legally formed a corporation; that they carried on the same business as they had prior to incorporation; that at times the business held itself out to others under the corporate name; and that the corporation itself entered into the agreement that has generated over eighty percent of its revenue. Salterio argues that he should not be punished because there may have been a corporation in the technical sense, or because it took several months for his lawyer to gather the business records. Given Salterio's apparent control over the business, his representation that there were no books and records because the corporation never operated could reasonably be interpreted as either dishonest in fact, or as resulting from his failure to make a reasonable inquiry and exercise reasonable business judgment. Accordingly, Salterio has failed to show that, as a matter of law, the record does not support a finding of bad faith.

2. Count II (Breach of Fiduciary Duty by Fryer)

Count II seeks damages arising out of Fryer's alleged "breach of contract, and breach of his fiduciary duties, while acting in his capacities as Trustee of the Voting Trust and as attorney for the Partners⁹ and [the corporation]." First Amended Complaint ¶ 50. The Voting Trust specifically limited Fryer's duty as Trustee: "The sole obligation of the Trustee shall be to cast the vote of each share of stock pursuant to the written direction of each beneficiary entitled to such share." Voting Trust at Art. VI. The plaintiff claims that Fryer cannot so limit his obligations because, as a trustee, his duties are set forth in 18-A M.R.S.A. § 7-302(a). However, section 7-302 begins with the words "[e]xcept as otherwise provided by the terms of the trust," *id.*, and in any event voting trusts are not trusts as defined under Title 18-A, 18-A M.R.S.A. § 1-201(45). The plaintiff concedes that he never personally, or through an agent, asked Fryer to vote his shares of stock in any respect. Lichtenstein Dep. I at 50. Accordingly, Fryer breached no duty, fiduciary or otherwise, in his role as voting trustee.

The plaintiff also claims that Fryer breached his fiduciary duty to the plaintiff by "act[ing] as the corporate attorney in providing advice to Salterio about the Keefe pay-off,¹⁰ [the plaintiff]'s non-compete [clause in the employment agreement] and [the plaintiff's] demand to have his ownership re-purchased." Plaintiff's Objection to Motions of the Defendants for Summary Judgment with Incorporated Memorandum of Law (Docket No. 81) at 23. For purposes of his

⁹ By "Partners" the plaintiff refers collectively to himself, Salterio, Butera and Keefe. First Amended Complaint ¶ 8.

¹⁰ Fryer's advice in the matter of the \$2,000 payment to Keefe, which Salterio allegedly designated as "purchase of stock," does not implicate any fiduciary duty that Fryer owed the plaintiff as his former attorney.

summary judgment motion, Fryer does not contest that he was acting as an attorney for the partners, including the plaintiff, during the incorporation process. However, once the incorporation process was completed Fryer represented the corporation itself. Lichtenstein Dep. II at 38-39. The plaintiff concedes that, except for the incorporation-related work he did on behalf of all four individuals, Fryer never represented him personally. *Id.* at 38.

The plaintiff cites no authority for the proposition that a lawyer breaches his fiduciary duty to a former client and subjects himself to civil liability by rendering advice, in a matter involving work done for a former client, to a client whose interest conflicts with the former client's. *Compare Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003-04 (Pa. 1990) (Pennsylvania law does not establish "civil liability for breach of fiduciary duty not to undertake representation of a client whose interests are materially adverse to a former client in a substantially related matter") with *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) (damages available under District of Columbia law for breach of fiduciary duty not to represent multiple clients with conflicting interests). Assuming, *arguendo*, that Maine would recognize such a cause of action, the plaintiff must prove that the attorney's breach caused the plaintiff damages. *See Hendry*, 73 F.3d at 402 (proof of causation required in breach-of-fiduciary-duty claim for compensatory damages, but not for disgorgement of attorney fees).

The plaintiff cites no evidence that he was damaged by Fryer's conduct. There is no suggestion that Fryer used to the plaintiff's detriment any confidential information obtained during the attorney-client relationship. In fact the plaintiff never had any in-person or telephone discussions with Fryer while Fryer was representing him, and never even met Fryer before the deposition. Lichtenstein Dep. I at 36. Fryer played absolutely no role in the plaintiff's alleged termination. *Id.*

To the extent that the plaintiff claims Fryer's opinion regarding the corporate status was fraudulent or a misrepresentation, the plaintiff cannot claim that he was damaged thereby because he did not rely on Fryer's opinion. *Id.* at 95; *see* Plaintiff's Statement of Disputed Material Fact Contradicting Jonathan Fryer (Docket No. 82) ¶ 15 (not disputing lack of reliance).

3. Count III (Breach of Contract)

In Count III the plaintiff asserts a claim for breach of the contracts respecting the formation and operation of the corporation and for his employment by the corporation. Salterio and Butera defend by arguing that the plaintiff cannot base his claim in any respect on the terms of the Employment Agreement because the corporation never executed it. In doing so, however, they overlook their promise to vote to adopt and ratify the agreement once the corporation was formed. Their failure to do so deprived the plaintiff of what he had bargained for: protection under the Employment Agreement. Accordingly, the plaintiff may maintain an action for breach of the agreement to cause the corporation to enter into the Employment Agreement.

Salterio and Butera further argue that the Employment Agreement is, in any event, invalid for failure to specify certain essential terms, i.e., the responsibilities of the parties. The agreement provided that "[a]s soon as the corporation is up and running, the parties shall delineate in detail the responsibilities and duties of each employee," and that, in the meantime, "each employee shall use his best efforts and shall perform all reasonable services for the promotion of the corporation." Employment Agreement at Exhs. A-D. Failure to subsequently set out in writing the specific responsibilities and duties of each employee does not invalidate the Employment Agreement. There is no question but that the parties intended to enter into a binding contract. The mere fact that they

did not write out the specific duties of each employee does not render the contract unenforceable, because the court can determine the employee's responsibilities from the circumstances surrounding the transaction and the conduct and intentions of the parties. *See Simons v. American Dry Ginger Ale Co.*, 140 N.E.2d 649, 652 (Mass. 1957) (contract not unenforceable as indefinite if meaning can be applied with reasonable certainty by reference to the transaction and attending circumstances); *Associated Credit Servs., Inc. v. Worcester*, 596 N.E.2d 388, 389 (Mass. App.) (“That the parties may have chosen to leave one of the terms of the contract indefinite does not render it unenforceable.”), *review denied*, 602 N.E.2d 1094 (Mass. 1992).¹¹

Finally, Salterio and Butera argue that the plaintiff is entitled to no damages on this claim because he was paid for all the work he did at the rate specified in the agreement. The agreement, however, provides that, while employed by the corporation and until terminated, the plaintiff was entitled to an initial base salary of \$500 per week and to increases based on a formula. The corporation could terminate employees without cause only upon thirty days written notice. The summary judgment record reveals no written notice of termination having been provided to the plaintiff. A rational jury could find that the Employment Agreement was breached when Salterio orally informed the plaintiff that the corporation had no more money with which to pay him.

4. Counts IV and V (Appointment of Receiver, Dissolution and Liquidation)

In Count V the plaintiff petitions for dissolution and liquidation of the corporation pursuant to 13-A M.R.S.A. § 1115, which authorizes dissolution and liquidation where “[t]he acts of the

¹¹ The Employment Agreement “shall be construed and enforced as a Massachusetts contract.” Employment Agreement at 9.

directors or those in control of the corporation are illegal or fraudulent,” or where “[t]he corporate assets are being misapplied or wasted.” *Id.* § 1115(1)(D), (E). The defendants argue that, because there is no evidence of a misrepresentation by Salterio or Butera, they are entitled to summary judgment on the fraud claim. However, consistent with the plaintiff’s allegations, *see* First Amended Complaint ¶ 62(a), a rational jury could find, based on the summary judgment record, that Salterio fraudulently represented to New England Coffee Co. that the Consolidated business was being carried on by the corporation, when in fact Salterio treated the business as his sole proprietorship. Furthermore, the defendants fail to address the claim that corporate assets are being misapplied or wasted.¹² A jury could reasonably find that Salterio’s treatment of the business as his sole proprietorship constituted misapplication of the corporate assets.¹³

C. The Shareholder Derivative Complaint

¹² The defendants also overlook the claim that Salterio and Butera have acted illegally in the management of the business and affairs of the corporation. The plaintiff alleges that the defendants have acted illegally by failing to hold annual meetings of shareholders in violation of 13-A M.R.S.A. § 603, failing to grant permission to inspect the corporate books and records, in violation of 13-A M.R.S.A. § 626, failing to keep accurate books and records in violation of 13-A M.R.S.A. § 625, and failing to exercise their duties in good faith in violation of 13-A M.R.S.A. § 716. First Amended Complaint ¶ 61(b)-(e). However, these alleged violations are “not the kind of illegality that justifies dissolution under 13-A M.R.S.A. § 1115(1)(D).” *Thompson’s Point, Inc. v. Safe Harbor Dev. Corp.*, 862 F. Supp. 594, 601 (D. Me. 1994).

The plaintiff also alleges that Salterio, aided and abetted by Butera, has converted the corporation’s property for his own use in violation of 17-A M.R.S.A. §§ 353 (theft by unauthorized taking or transfer) and 358 (theft by misapplication of property). First Amended Complaint ¶ 61(a). Given the absence of briefing by any of the parties on these claims, I express no opinion on their merits.

¹³ Section 1123(3)(E) authorizes the court, in an action for dissolution under section 1115, to appoint a receiver. Having failed to demonstrate that they are entitled to summary judgment on Count V, the defendants are not entitled to summary judgment on Count IV.

The plaintiff claims that Salterio and Butera are liable for breach of their fiduciary duty as officers and directors of the corporation, and for unjust enrichment. Butera argues that he is entitled to summary judgment because “he had nothing to do with the management of the business as respects operations or finance.” Memorandum in Support of Motion for Summary Judgment of Peter Butera and John Salterio (Docket No. 52) at 11. The complaint alleges that Salterio and Butera converted, misapplied and diverted corporate assets and opportunities for their own use, Complaint (Docket No. 1, Civ. No. 95-170-P-C) ¶¶ 39, 53, and that Butera has aided and abetted Salterio in the breach of Salterio’s fiduciary duties to the corporation, *id.* ¶ 50. The only evidence, cited by the plaintiff, of Butera’s involvement in the management of the corporation is that he wrote the checks for the business during 1990. Salterio Dep. at 100-01. Based on this evidence, no rational jury could find Butera liable for breach of fiduciary duty or unjust enrichment. Accordingly, I recommend that the court grant summary judgment for Butera on Counts II and III of the shareholder derivative complaint.

Salterio argues that the plaintiff has failed to identify any specific act of conversion of corporate assets. Salterio concedes, however, that the corporation entered into the New England Coffee Agreement. Nevertheless, he has treated the commissions from that contract as income of his alleged sole proprietorship, rather than of the corporation. Furthermore, since a rational jury could find that the incorporators agreed to incorporate the preexisting business, CSG, Salterio’s admitted treatment of the post-incorporation business as his own sole proprietorship could constitute conversion of corporate assets. Accordingly, I recommend that the court deny Salterio’s motion for summary judgment on Counts I and III of the shareholder derivative complaint.

The shareholder derivative complaint seeks no relief against Fryer. Complaint (Civ. No.

95-170-P-C) ¶ 7. Rather, the plaintiff joined Fryer as a necessary party pursuant to Fed. R. Civ. P. 19 because Fryer was the record owner of the corporation's outstanding shares. *Id.* On July 11, 1995 this court denied Fryer's motion to dismiss the shareholder derivative complaint. Subsequent to the filing of his motion to dismiss, Fryer's attorney delivered to Salterio's attorney the original of Stock Certificate No. 5, bearing on the reverse side a Stock Power executed by Fryer, conveying 51 shares to Salterio, 28 to the plaintiff, 15 to Keefe and 8 to Butera. Affidavit of Thomas A. Cox., Esq. ("Cox Aff.") (Docket No. 64) ¶ 3 & Exh. B. At the same time attorney Cox delivered to Salterio's attorney, the plaintiff's attorney and Keefe personally stock powers signed by the plaintiff conveying to each shareholder his respective interest. *Id.* ¶¶ 4-5 & Exhs. C-F. Thus, Fryer is no longer the record owner of the corporation's outstanding shares as alleged in the shareholder derivative complaint.

The plaintiff does not suggest, nor do I find, any reason why Fryer is now a necessary party to the shareholder derivative action. Accordingly, I recommend that the court grant Fryer's summary judgment motion on all counts of the shareholder derivative complaint.

III. Conclusion

For the foregoing reasons, I recommend that the defendants' motions for summary judgment on the individual complaint be **GRANTED** in favor of Butera on Count I (refusal to permit inspection of corporate books and records), **GRANTED** in full on Count II (breach of fiduciary duty by Fryer), and otherwise **DENIED**. I further recommend that the defendants' motions for summary judgment on the shareholder derivative complaint be **GRANTED** in full in favor of Fryer, **GRANTED** in favor of Butera on Counts II (breach of fiduciary duty by Butera) and III (unjust enrichment), and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of July, 1996.

*David M. Cohen
United States Magistrate Judge*