SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 03/30/2021 TIME: 02:38:00 PM DEPT: C-68

JUDICIAL OFFICER PRESIDING: Richard S. Whitney
CLERK: Richard Cersosimo
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2020-00030592-CU-MC-CTL** CASE INIT.DATE: 08/31/2020
CASE TITLE: **Dunn vs Mikkelson [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

APPEARANCES

The Court, having taken the above-entitled matter under submission on 3/30/2021, and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

DEFENDANTS DAVID MIKKELSON'S DEMURRER TO COMPLAINT OF PLAINTIFF TYLER DUNN is SUSTAINED without leave to amend.

The Court agrees with Defendant David Mikkelson. Plaintiff Tyler Dunn ("Plaintiff") is attempting to circumvent this Court's ruling in *Proper Media LLC vs Bardav Inc.*, case number 2017-16311 ("Lead Case"). Plaintiff asserts he was an indispensable party in the Corporations Code section 709 proceeding in the Lead Case. "The consequence of failing to join (or dismissing) an indispensable party is to invite an inconsistent judgment." (*Washington Mutual Bank v. Blechman* (2007) 157 Cal.App.4th 662, 668.) "[A] judgment in an action not naming an indispensable party...might well be inadequate because it is subject to later collateral attack by the nonjoined indispensable party." (*Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 693.) CCP section 389 provides, in relevant part:

A person ... shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

(Code Civ. Proc., § 389(a).) "Whether a party is necessary and/or indispensable is a matter of trial court discretion in which the court weighs 'factors of practical realities and other considerations.'" (*Morrical v. Rogers* (2013) 220 Cal.App.4th 438, 461 [Citations omitted].)

Here, complete relief could be accorded Plaintiff in his absence as the decision was binary – either the share was transferred as one, with one vote, or it was transferred as fractional shares. Plaintiff does not present any evidence or argument that the Court could not have accorded Plaintiff relief in his absence.

Further, while not determinative, on January 19, 2018, Plaintiff signed an acknowledgement that the "ownership interest that [he] possessed in one share of stock in Bardav, Inc. has been forfeited ...." (Defendant's Request for Judicial Notice ["RJN"] Exhibit E.) At the time of the Corporations Code section 709 proceeding in the Lead Case, Plaintiff explicitly acknowledged he did not have an interest in the share, the subject of the Corporations Code section 709 hearing. Plaintiff has not disclaimed this acknowledgment. While it was later determined that the share did not revert to Richmond and Schoentrup, that ruling was not made until after the Corporations Code section 709 hearing was completed and decided. (See RJN Exhibit A.)

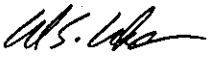
Moreover, the practical realities are that Plaintiff was not an indispensable party and that this action is at least partially against Plaintiff's own apparent interest. The Court in the Lead Case determined the share was transferred as fractional shares. Plaintiff is challenging that determination, in favor of an interpretation that it was transferred as one share. If it was transferred as one share, Plaintiff would essentially have no say in how that share casts its vote because Richmond and Schoentrup would own the majority (80% combined) while Plaintiff would only own 6.68%. While it is possible Richmond and Schoentrup could want to vote differently, at Plaintiff could break a tie, that would only be in the case that Miller and Green were not aligned with Richmond or Schoentrup. On the other hand, with the share being fractional, Plaintiff always would have some voting power, regardless of how Richmond and Schoentrup decided to vote.

To the extent Plaintiff would argue that he was aligned with Richmond and Schoentrup as far as voting such that this action is not against his own interests, then Plaintiff would be essentially conceding that res judicata should apply.

The prerequisite elements for applying the doctrine to either [*res judicata* or collateral estoppel] an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.

(*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 [Citations omitted].) This action concerns the same exact issue in the Corporations Code section 709 proceeding in the Lead Case (characterization of the Barbara share transfer) and the hearing resulted in a final judgment. Thus, to the extent Plaintiff was in privity with Richmond and Schoentrup, *res judicata* or collateral estoppel applies. The Court finds Plaintiff's interests were sufficiently close to those of Richmond and Schoentrup so as to "justify application of the doctrine of collateral estoppel." (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal.App.4th 1053, 1070.) That the interests of Plaintiff, Richmond and Schoentrup are aligned is supported by the undisputed fact they all take the position that the Barbara share was not transferred as fractional shares.

In summary, even if Plaintiff had demonstrated he is a necessary and indispensable party, which he is not, his action would be barred by the doctrine of collateral estoppel. The Court also agrees with some of Defendant's other arguments in his demurrer, but believes the above reasons are sufficient to sustain the demurrer. Plaintiff has the burden of proving a reasonable possibility of amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Plaintiff does not demonstrate how Plaintiff could possibly amend the complaint to show he was an indispensable party without submitting a sham pleading. The demurrer, including as to the joinder, is sustained without leave to amend. The requests for judicial notice are granted.



Judge Richard S. Whitney

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
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SHORT TITLE: Dunn vs Mikkelson [IMAGED]

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2020-00030592-CU-MC-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the Final ruling on Demurrer was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 04/01/2021.

Clerk of the Court, by: R. Cerasimo _____, Deputy

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