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Derivative Fraud Suit Is Dismissed Here

Improper Venue in Shareholder Challenge

BY EDWARD A. ADAMS

A SHAREHOLDER'S derivative suit challenging an award of stock and options to the former chairman of Manhattan-based tobacco giant Philip Morris Companies Inc. has been dismissed by a Manhattan State Supreme Court justice.

Justice Peter Tom dismissed the suit based on forum non conveniens grounds, finding the issues raised involved the internal affairs of Philip Morris. Such issues are more appropriately decided by the courts of Virginia, where the company is incorporated. *Seinfeld v. Bailey*, Part 55, was issued last week.

The decision will be published tomorrow.

Prior to his September 1991 retirement, the Philip Morris board of directors awarded Chairman and CEO Hamish Maxwell 150,000 shares of stock, which he can sell in 1996, and gave him the option to purchase in 1996 an additional 500,000 shares. The stock and options were worth $15 million at the time of the award, according to plaintiff's counsel Irving Bizar.

The plaintiff claimed the award was "excessive and a gift," which constituted a "fraud and a waste of corporate assets," said Justice Tom.

The company relied on *Hart v. General Motors Co.*, a 1987 case from the First Department that held courts in a company's state of incorporation are best situated to judge the legality of the actions of directors involving a company's internal affairs.

Philip Morris claimed that the payments to Mr. Maxwell were an internal matter, which the courts of Virginia had a "paramount interest" in resolving.

The company also claimed the case implicates a new Virginia corporate governance statute — a law that has not yet been interpreted by Virginia's courts. Without any guidance from those courts, New York judges should not decide the issues raised in this case, it claimed.



Justice Peter Tom

Justice Tom found that the need for uniform application of Virginia's laws required the courts of that state to handle the case.

The judge rejected arguments by plaintiff Greg Seinfeld that factors such as the company's New York headquarters, the New York meetings of its board of directors and the plaintiff's own New York home were enough to keep the case here.

The judge also rejected arguments that the new Virginia corporate statute

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Suit Over DeKooning Work Left Standing

BY MARTIN FOX

A STATE JUDGE has refused to dismiss an action over the ownership and authenticity of 38 sculptures that are claimed to be the work of William deKooning, one of the world's major abstract expressionists.

Manhattan Supreme Court Justice Karla Moskowitz kept intact a cause of action for a declaratory judgment brought by another renowned sculptor, Philip Pavia, who claimed to have cast and molded the statues from models created by Mr. deKooning after receiving a commission from him and his now-deceased wife in 1987.

The decision will be published tomorrow.

In rejecting a dismissal motion, Justice Moskowitz ordered a conference for next month to begin discovery on the issue of whether Mr. deKooning "did in fact create the artwork." Mr. deKooning was declared incompetent in 1989, and his affairs are handled by two co-conservators. The plaintiff also was directed to file an amended complaint adding the estate of Mr. deKooning's wife Elaine as a party.

The crux of Mr. Pavia's claim in *Pavia v. Eastman* is that he is entitled to compensation of $1 million for his commission and a declaration the works are deKooning originals, or in the alternative, ownership rights to the sculptures, of which he has possession of approximately 30. One of the statues was sold for $30,000 at auction in 1989, but the sale was later rescinded when the deKooning conservators challenged its description as a deKooning original. They maintained it was the creation of the sculptor's daughter.

In a separate action to set aside liens against the sculptures filed by Mr. Pavia, the defendants also maintain Mr. Pavia was never commissioned by the deKoonings to cast the sculptures. The defendants maintain they are "entitled to possession of the 'fake' sculptures to ensure they will not be sold as the work of William deKooning."

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Excerpt From the Decision

'There is no question that Pavia casted and molded the sculptures and that he expected compensation for his services. What is not clear, however, is who requested and who accepted these services . . . The court cannot say Pavia's claim is plainly devoid of merit.'

Justice Karla Moskowitz



County Lawyers Panel Allows 'Blended Rate' Billing

'or Wetlands Law

setbacks of 75 to 150 feet.

Carolyn Zenk, an attorney for Group for the South Fork, lobbied unsuccessfully in favor of town pesticide regulations throughout the long debate. At one point, she sent board members a list of cases where D.E.C. regulations "failed to protect the resource," evidence, she claimed, of the need for local control. She also submitted studies describing the agricultural industry as "a leading source" of groundwater pollution.

Bits And Pieces

Manmade ponds would be exempt, as would routine repairs to existing structures. Last week, the board redefined "routine repairs" to include interior renovations, such as moving walls, and exterior repairs, such as replacing a roof, shingles, or deck, in-place, in-kind.

"That was always the intent," said Ms. Riley, "but the wording wasn't clear enough."

The town attorney said the board had researched wetlands protection laws in other towns, including East Hampton, where regulations are considered strict, and "borrowed bits and pieces from here and there" in coming up with its original proposal.

East Hampton Town enacted its existing natural resources regulations more than 10 years ago, although its first wetlands law dates from the late 1960s. Plans for construction or landscaping within 150 feet of a wetland, or installation of a septic system within 200 feet, are reviewed by the Zoning Board of Appeals, which has the power to approve or reject natural resources permits.

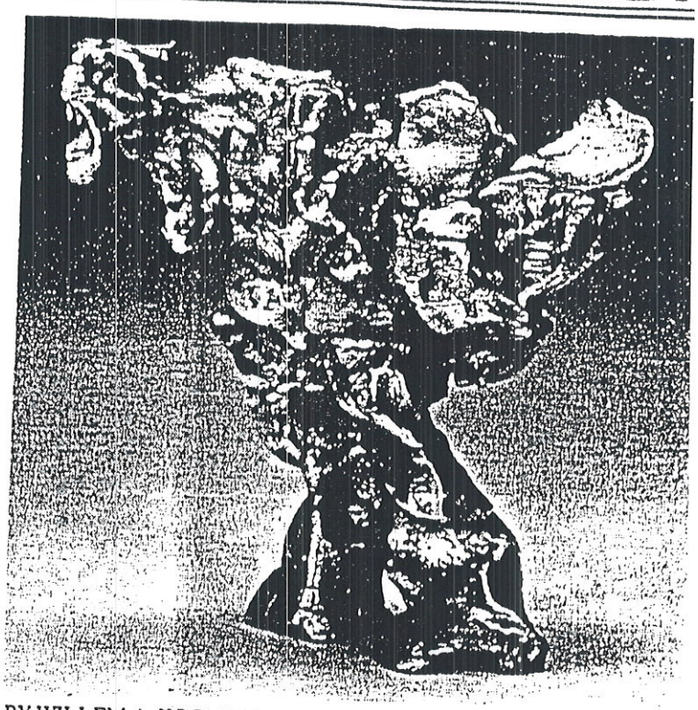
Called "Good Law"

James Cavanagh, a Water Mill resident and East Hampton's assistant director of natural resources, said the Southampton proposal was "a good law."

"The problems in the East Hampton laws have been worked out thoroughly here," he told the Southampton Town Board at last week's hearing. It is Mr. Cavanagh's job to inspect septic systems and other contributors to wetlands pollution and to advise the Z.B.A., along with town planners, on permit applications.

Mr. DiPietro also represents two Westhampton subdivisions now undergoing planning review and argued such properties, those reviewed by

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BY WILLEM de KOONING? Or by his daughter, Lisa? A series of sculptures and their authenticity is at the center of a million-dollar lawsuit between the sculptor Philip Pavia of East Hampton and the estate of Mr. de Kooning, of Springs.

Sculpture

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fanfare in 1990. But last week, a press release went out from Ms. Elston's office heralding Justice Moskowitz's decision, which she said gives new impetus to the sculptor's case.

"This was the first relevant motion," Ms. Elston said, explaining the decision to seek publicity. Mr. Pavia and his wife declined comment, on their lawyer's advice.

"No Proof"

Representatives of the de Kooning estate see Mr. Pavia's case as one of outlandish claims devoid of substantiation. "These are telephone-book numbers," said Leslie Fagan of Paul Weiss, Rifkind, Wharton, and Garrison in Manhattan.

"This guy does not have a single scrap of paper to prove these costs," Mr. Fagan said. "He did these castings," he said, "but the circumstances under which he did them are very much in dispute."

"This is a case of someone who may or may not have had a conversation, to do some kind of work" for the de Koonings, the lawyer said.

Not His, Hers

The estate contends that the clay models Mr. Pavia enlarged into bronze were actually made by Lisa de Kooning, who also worked in her father's studio, and, it seems, that Mr. Pavia tried to pass them off as her father's.

"She says that they are hers, and I have no reason not to believe her," said Mr. Fagan.

Ms. de Kooning, who has been released from the suit, did not return phone calls; Mr. Eastman, who also has a house in East Hampton, was in London and could not be reached. At the time of Justice Moskowitz's ruling, he was the sole remaining defendant in the case.

Mr. Pavia's lawyer pooh-poohed the claim. "To try to say that he doesn't know the difference between a Willem de Kooning and a Lisa de Kooning is defamatory. It's implicitly accusing him of art fraud," Ms. Elston said.

She said her client had reproduced some of Lisa de Kooning's work as well, a "very representative" lion and tiger, but said the styles of father and

"I'd say she's not in a position to make that judgment," retorted Mr. Fagan.

Their trump card, Ms. Elston said, will be to fingerprint Mr. de Kooning himself as the case goes on; the next conference is scheduled for Tuesday. The master's fingerprints, she said, were all over the works.

The estate apparently first challenged the authenticity of the pieces after Mr. Pavia sold one (with, Ms. Elston said, permission from the de Koonings) to a man named S. Herman Klarsfeld, who gave it to Christie's to auction in 1989. It was listed as an "original de Kooning" and brought $30,000.

The sale was nullified, however, after John Silberman, another Paul, Weiss attorney, told the auction house on behalf of the estate that the work was actually Lisa de Kooning's. Christie's then circulated an internal memo repeating Mr. Silberman's opinion.

"WdeK"

Mr. Pavia called Mr. Silberman's statements defamatory, but State Supreme Court did not agree. "Silberman's written and spoken words that the sculpture 'is not the work of Willem de Kooning' are neither libelous nor defamatory per se," the justice wrote. "The words do not even refer to Pavia."

Christie's memo also came up for scrutiny. In it, a lawyer for the auction house wrote: "Silberman believes the initials 'WdeK' were put on in Italy. Pavia acted in complete good faith in assuming that the sculpture had been created by William de Kooning."

"Pavia goes too far," Justice Moskowitz wrote, "in asserting that, as a result of the . . . cancellation of the auction sale, he is viewed by members of the art world as a liar and a criminal. Pavia's interpretations are too strained and do not attribute the plain meaning to the words."

"Terribly Wrong"

Ms. Elston said Mr. Pavia, who still has about 30 of the disputed sculptures in his city apartment, would appeal the dismissal of the defamation charges. Calls to Christie's were not returned by press time.

What it will mean to Elaine de Kooning's estate to be named in the suit was not immediately clear. Marjorie Luyckx of Freeport, her sister and the executor of her estate, said it had been served, but that it would seek not to be named.

"Our lawyer is going to answer to that," Mrs. Luyckx said. "It really doesn't have much to do with [Mrs. de Kooning]."

"It's all ridiculous," she added. "It's a bunch of presumptions and stuff."

Among the close and occasionally combative Abstract Expressionist community in East Hampton, the case has led to puzzlement and some bad feelings. "It's just awful," said Joan Ward of East Hampton, who is the mother of Lisa de Kooning. "We really are old friends. Something has gone terribly wrong."