

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MARTY AND DOROTHY SILVERMAN
FOUNDATION,

Plaintiff,

-against-

PAUL J. DAVIS, RICHARD C. LIEBICH,
CENTER FOR MEDICAL SCIENCE, INC. and
CHARITABLE LEADERSHIP FOUNDATION,

Defendants.

Index No.

VERIFIED COMPLAINT

Plaintiff, by its attorneys, Jaroslawicz & Jaros, complaining of the defendants, upon information and belief, alleges as follows:

THE PARTIES

1. At all times hereinafter mentioned, plaintiff is a foreign not-for-profit corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to do business and doing business in the State of New York.

2. At all times hereinafter mentioned, upon information and belief, the defendant Paul J. Davis ("Davis") was the director of Ordway Research Institute Inc. ("Ordway").

3. At all times hereinafter mentioned, upon information and belief, the defendant Richard C. Liebich ("Liebich") was the chairman and treasurer of Ordway.

4. Ordway is a domestic not-for-profit corporation, duly organized and existing under and by virtue of the laws of the State of New York.

5. Ordway is not being named as a defendant in this action because Ordway filed for bankruptcy on April 28, 2011 (Exhibit A).

6. At all times hereinafter mentioned, upon information and belief, the defendant Center for Medical Science, Inc. ("CMS") is a domestic not-for-profit corporation, duly organized and existing under and by virtue of the laws of the State of New York.

7. At all times hereinafter mentioned, the defendant Liebich is the president of CMS and controls its affairs and finances.

8. At all times hereinafter mentioned, upon information and belief, the defendant Charitable Leadership Foundation ("CLF") is a not-for-profit corporation, duly organized and existing under and by virtue of the laws of the State of New York.

9. At all times hereinafter mentioned, the defendant Liebich is the president of CLF and controls its affairs and finances.

THE UNDERLYING FACTS

10. Plaintiff is a not-for-profit corporation which, as part of its mission, lends money to valid educational and scientific organizations and other entities which are for the benefit of the public.

11. On or about June 21, 2010, plaintiff agreed to lend \$3.5 million to Ordway.

12. Article 2.1 of the loan agreement (Exhibit B) specifically provides as follows:

Purpose of the Loan. The Lender and the borrower agree that the purpose of the Loan is to provide the Borrower with funding for the purchase and renovation of premises located at 130 New Scotland Avenue, Albany, New York, (including but not limited to expenses related to diligence, testing, studies, historical preservation, engineering and architectural fees, legal expenses, recording fees and taxes and other such expenses and closing costs related to this Agreement) the former New Scotland Avenue Armory, the purpose of all of which is to significantly further the accomplishment of the Borrower's and the Lender's tax-exempt purposes described in Section 170(c)(2)(B) of the Internal Revenue Code of 1986, as amended (the "Code").

13. In Section 2.2 of the loan agreement, borrower covenants to use the loan proceeds in furtherance of purposes described in Section 2.1 and to "repay any portion of the loan proceeds not used in furtherance of such purposes." This was also repeated in Section 5.1

14. The loan for \$3.5 million was made on or about June 21, 2010.

15. According to the closing statement (Exhibit C), the sum of \$1,444,195 was used to purchase the building in question and for related expenses. The balance of \$1,980,807 was distributed to Ordway, controlled by the defendant Davis and Liebich.

16. On April 28, 2011, some ten months after having received the proceeds of the loan, Ordway filed a bankruptcy petition in the United States District Court for the Northern District of New York, Case No. 11-11322-1 (Exhibit A).

17. At that time, Ordway revealed that to its nineteen largest creditors - not including the plaintiff - it owed \$1,970,231.34 (Exhibit A).

18. At the time plaintiff was induced to lend the \$3.5 million on favorable terms to Ordway as part of plaintiff's public benefit endeavors, a financial statement had been provided from Ordway's accountants, the firm of Bollam Sheedy Torani & Co. LLP of Albany, New York, indicating that as of June 30, 2009, Ordway had substantial assets as well as cash (Exhibit D).

19. An investigation has revealed that other than the money used to purchase the New Scotland Avenue Armory, no monies were used pursuant to the purpose of the loan, despite the exclusive and restricted purpose of the loan and commitment for use of the proceeds.

20. In fact, upon information and belief, the proceeds were transferred by the defendant Liebich and Davis to the two other entities controlled by Liebich, the defendant CMS and CLF, and/or were used for personal expenses by Davis and Liebich.

**AS AND FOR A FIRST CAUSE OF ACTION
AS AGAINST ALL DEFENDANTS**

21. All of the defendants breached the contract which was entered into between the plaintiff and Ordway, which was executed by the defendant Davis as director on Ordway's behalf with respect to the use of the proceeds.

22. By reason of the foregoing, since the proceeds were diverted to the defendants individually or to CMS and CLF, the entities they control, plaintiff is entitled to recover from those who received the benefit of the funds which were to be used

exclusively for Ordway's renovation of the facility, for public benefit endeavors, to wit as Ordway.

23. These defendants are responsible to return to the plaintiff the \$3.5 million plus interest, costs and attorneys' fees.

**AS AND FOR A SECOND CAUSE OF ACTION
AS AGAINST DEFENDANTS
PAUL J. DAVIS AND RICHARD C. LIEBICH**

24. Plaintiff repeats, reiterates and realleges each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

25. Davis and Liebich knew that the financial information submitted showing Ordway's financial condition would be used by the plaintiff and was material to the plaintiff in considering whether or not to make the loan to Ordway.

26. Ordway's financials and financial statement submitted to the plaintiff in order to induce the plaintiff to make the loan were false and fraudulent and did not reflect Ordway's true financial condition at that time as such as is now claimed in the Bankruptcy Court; there were substantial monies due to others.

27. Section 3.7 of the loan agreement (Exhibit B) specifically provided:

Financial Statements. All financial statements of the Borrower delivered to the Lender in connection with this Loan, together with the related statement of support, revenue, expenses and changes in fund balance for the year then ended, fairly present the financial position of the Borrower and the results of its operations for the periods then ended in accordance with generally accepted accounting principles consistently applied. There are no unadjusted audit

differences relating to the foregoing statements that have not been disclosed to the Lender. Since the dates of such financial statements there has been no material adverse change in the activities, operations, assets or properties or in the condition, financial or otherwise, of the Borrower. (Emphasis added.)

28. When Davis and Liebich induced the plaintiff to make the \$3.5 million loan to Ordway in June 2010, the defendants knew there had either been material adverse changes in Ordway's financial condition since June 2009 or the June 2009 financial statements were inaccurate.

29. The defendant Davis signed an officer's certificate on June 21, 2010 certifying that as of that date the representations made by Ordway were correct in all material respects as required by Section 4.2(b) of the loan agreement (Exhibit B).

30. These defendants were both on the Board of Ordway which approved a Board resolution to borrow money for the limited purpose.

31. But for the misrepresentations made by these defendants as to Ordway's financial condition, plaintiff would never have made the loan to Ordway; plaintiff relied on these financial representations as well as the use of the proceeds provision in making the loan.

32. Among other things, the misrepresentations made by the defendants and as certified by Davis, did not reveal that Ordway was seriously behind in its monthly rent obligations.

33. Davis and Liebich also failed to reveal that Liebich had entered into an arrangement with CLF and CMS, two entities controlled by Liebich, to divert the balance of the funds, nearly \$2 million, to, among other things, pay alleged back rent for CMS and not to use the nearly \$2 million in proceeds for the purpose of renovating the New Scotland Avenue Armory, the building in question so it could be used as a science center, as represented to the plaintiff and as required by the use of proceeds clause.

34. But for these misrepresentations and others made by the defendants Davis and Liebich, and the misrepresentations as to Ordway's financial condition, plaintiff never would have loaned the \$3.5 million to Ordway or permitted the defendants Davis and Liebich to have access to the funds.

35. Prior to discovery plaintiff is unable to set forth exactly what Davis & Liebich did with the \$2 million other than divert a substantial portion to the defendants CMS and CLF, the two entities controlled by Liebich.

36. By reason of the defendants' fraud, plaintiff is entitled to recover all of its damages from the defendants, including punitive damages, costs and disbursements.

**AS AND FOR A THIRD CAUSE OF ACTION
AS AGAINST DEFENDANTS
PAUL J. DAVIS AND RICHARD C. LIEBICH**

37. Plaintiff repeats, reiterates and realleges each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

38. If the Court for any reason finds that the defendants Davis and Liebich did not willfully seek to defraud the plaintiff into making the \$3.5 million loan to Ordway, then

at the very least, these defendants were negligent and grossly negligent in misrepresenting both Ordway's financial condition and how Ordway intended to use the proceeds, in order to obtain the \$3.5 million from the plaintiff.

39. If Davis and Liebich did not willfully conceal Ordway's financial condition and use of the proceeds of the loan, then at the very least they were grossly negligent in misrepresenting Ordway's financial condition and how they intended to use the proceeds. In fact, Ordway's financial condition was far different from that represented. Ordway filed for bankruptcy within ten months of the loan agreement with the plaintiff, and after purchasing the premises in question, the remaining funds were not used for the exclusive purpose as provided in the loan agreement.

40. Davis and Liebich had an obligation to verify Ordway's true financial condition if they did not already know it, and to supervise and safeguard the disposition of the \$2 million for the limited use of the proceeds.

41. By reason of the foregoing, Davis and Liebich are liable to the plaintiff for the \$3.5 million, plus interest, and costs and attorneys' fees.

**AS AND FOR A FOURTH CAUSE OF ACTION
AS AGAINST DEFENDANTS
CENTER FOR MEDICAL SCIENCE, INC. AND
CHARITABLE LEADERSHIP FOUNDATION**

42. Plaintiff repeats, reiterates and realleges each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

43. Upon information and belief, these defendants are controlled by the defendant Liebich.

44. Prior to discovery, Davis' specific relationship to these defendants is not currently known to the plaintiff.

45. These defendants, which were controlled by and through Liebich, were fully aware that the use of the loan proceeds by Ordway, was limited as required by Section 2.1 of the loan agreement (Exhibit B).

46. These defendants are responsible to return to the plaintiff at the very least the money they wrongfully received in violation of the use of proceeds clause for having funds diverted by Liebich and/or Davis.

47. No part of the proceeds of the loan was used to make any renovations to the building. Said money was diverted since the building which was supposed to be renovated and used for scientific purposes was never completed and these defendants should be responsible for the full amount plus costs and attorneys' fees.

**AS AND FOR A FIFTH CAUSE OF ACTION
AS AGAINST DEFENDANTS
CENTER FOR MEDICAL SCIENCE, INC. AND
CHARITABLE LEADERSHIP FOUNDATION**

48. Plaintiff repeats, reiterates and realleges each of the foregoing allegations with the same force and effect as if more fully set forth at length herein.

49. These defendants have been unjustly enriched by receiving money which they knew they were not entitled to and which was diverted to them by Liebich.

50. By reason of the foregoing, these defendants should disgorge the funds they were not entitled to and by which they were unjustly enriched, all together with costs, interest and attorneys' fees.

WHEREFORE, plaintiff demands judgment against the defendant, to recover for all of its damages, all together with the costs and disbursements of this action.

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By: _____


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