Chapter 92

Theft or Loss of Business Opportunities

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I. INTRODUCTION
§ 92:1 Scope note
This chapter examines the theft or loss of business opportuni-
ties, a frequent subject of commercial litigation in New York courts. The “theft” of business opportunities by a corporate director, officer, or employee is actionable under New York law through the “corporate opportunity” doctrine. This doctrine, which is based on the breach of fiduciary duties involved in misappropriating an opportunity, provides a remedy when corporate fiduciaries acquire business opportunities that belong to the corporation. The “loss” of a business opportunity, if caused by the malicious and improper conduct of an unrelated party, may be actionable as a tortious interference with contract, with pre-contractual relations, or with prospective business advantage. This chapter sets forth the elements of each action, discusses the available remedies, and provides practice tips for attorneys prosecuting or defending against such claims.

§ 92:2 Theft of business opportunities: The “corporate opportunity” doctrine

The corporate opportunity doctrine is used most frequently where:

- a corporation’s director, officer, or employee leaves to work for a competing company, or secretly commences a competing business while still working for the corporation;¹ or
- a business organization’s partners, officers or directors have diverted an opportunity away from the organization for their own use and profit.²

[Section 92:2]

¹See, e.g., Glenn v. Hoteltron Systems, Inc., 74 N.Y.2d 386, 391–92, 547 N.Y.S.2d 816, 818, 547 N.E.2d 71, 73–74 (1989); Duane Jones Co. v. Burke, 306 N.Y. 172, 195–96, 117 N.E.2d 237, 249 (1954); see also In re Verdeschi, 63 A.D.3d 1084, 1085, 882 N.Y.S.2d 440, 442 (2d Dep’t 2009) (holding that surviving shareholders stood in a fiduciary relationship to their corporation and were not allowed to divert and exploit any opportunity that should be deemed an asset of the corporation); Laro Maintenance Corp. v. Culkin, 267 A.D.2d 431, 433, 700 N.Y.S.2d 490, 492 (2d Dep’t 1999) (holding that, as an officer in the plaintiff corporation, the defendant was under a fiduciary duty to refrain from engaging in a competing business); Golden Eagle/Satellite Archery, Inc. v. Epling, 244 A.D.2d 959, 665 N.Y.S.2d 169, 170 (4th Dep’t 1997) (holding that corporation’s president and chief executive officer had a duty not to deprive the corporation of opportunity to obtain a patent for an invention developed using the corporation’s employees and computers); Howard v. Carr, 222 A.D.2d 843, 845–46, 635 N.Y.S.2d 326, 328 (3d Dep’t 1995) (corporate officer was found liable for diversion of corporate assets and opportunities after he “virtually put [the corporation] out of business” by taking all of its employees, sales associates, and customers, converting its assets, and commencing operation under a similar name).

§ 92:3 Preliminary considerations

Both plaintiff and defendant must make a variety of strategic choices at the outset of a corporate opportunity case. The plaintiff's goals will vary depending upon the time at which the claim is discovered. If the diversion is still ongoing—for example, if an employee or ex-employee is actively soliciting the company's customers for a competing business, or if individual directors or officers are pursuing an acquisition in the corporation's line of business and the transaction has not yet been consummated—the plaintiff's principal objective will be to stop the diversion in its tracks. To that end, plaintiff's counsel should seek a temporary restraining order and/or preliminary injunction, to preserve or restore its ability to obtain the business opportunity at issue.¹

If the diversion has already occurred, returning the parties to their previous positions may prove difficult or impossible. Thus, when the wrong is not discovered until the disputed transaction is complete, an award of damages may become the plaintiff's principal litigation objective, although permanent injunctive relief and return of the opportunity may still be sought. Similarly, if the diverter possessed confidential or proprietary information belonging to the plaintiff, the lawsuit should seek its return.

The defendant, conversely, will want to hold on to the business opportunity it has acquired. Where the defendant is an individual forming a new business venture, injunctive relief or a settlement requiring return of the opportunity may be out of the question, since the opportunity is likely the source of the defendant's livelihood. Because new ventures are frequently short on cash, a money settlement may not be an option. For these reasons, the defendants in corporate opportunity cases may feel they have no choice but to litigate the matter to a conclusion.

A settlement agreement in a corporate opportunity case could include a noncompetition or nonsolicitation provision relating to specific customers. The anticompetitive effect of such provisions may be justified if they are drawn only as broadly as may be reasonably necessary to redress the claimed fiduciary breach. This sort of ongoing obligation should be described in detail to the extent practicable, and the agreement should contain clear limits on any provisions that restrict competition (e.g., noncompetition obligations might cover only an identified customer whose busi-

¹A sample temporary restraining order has been included in this chapter in § 92:98. See generally Chapter 17, "Provisional Remedies" (§§ 17:1 et seq.) for discussion of temporary restraining orders and preliminary injunctions.
ness was alleged in the lawsuit to have been wrongfully solicited, and could be limited to one year or some other defined period reasonably necessary to remedy the claimed injury).

§ 92:4 History and analysis

The cause of action for diversion of a corporate opportunity derives originally from the fiduciary duty of loyalty owed by corporate directors and officers: the New York courts forbade fiduciaries from acting in their self-interest when their own interests conflicted with those of the corporation.\(^1\) Additionally, some courts have understood business opportunities to constitute a form of “property,” and have treated diversion claims as alleging that the corporation was wrongfully deprived of such property.\(^2\)

These two views differ conceptually, and that difference accounts for the varying requirements imposed by the New York courts when determining what constitutes a “corporate opportunity.” A focus upon the fiduciary’s breach of duty as the actionable wrong will lead courts to take a broad view when deciding what business opportunities should be subject to the doctrine. For example, the corporate opportunity doctrine has been applied to the individual pursuit of a patent by a corporation’s president and chief executive officer. Although the CEO was not hired as an inventor, the court focused on his fiduciary duty to act in the corporation’s best interest (and the fact that he used the company’s employees and computers to aid his efforts).\(^3\)

Conversely, classifying business opportunities as a form of property will cause courts to assure themselves, before awarding relief, that the corporation “owns” or has a tangible expectancy of acquiring the opportunity at issue. For example, a court granted a company judgment as a matter of law where its former em-

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\(^2\)See, e.g., New York Trust Co. v. American Realty Co., 244 N.Y. 209, 216, 155 N.E. 102, 104 (1926) (stating that an unfaithful corporate agent must account for profits because, under the “general principles applicable to recognized agency,” any “profits made and advantage gained by the agent in the execution [sic] of the agency belong to the principal”); Turner v. American Metal Co., 268 A.D. 239, 273, 50 N.Y.S.2d 800, 830–31 (1st Dep’t 1944) (“There is no authority for the [lower court’s] finding that Climax took the [alleged corporate opportunity] away from American Metal, for the latter never owned that business”).

ployee had formed a new corporation and solicited an opportunity from one of its prospective clients while he was still employed by the company.\textsuperscript{4} The court concluded that, although an employee may incorporate a business prior to leaving his employer without breaching any fiduciary duty, he may do so only without making improper use of the employer’s time, facilities or proprietary information.\textsuperscript{5} In another case, defendant unilaterally seized the tangible and intangible assets of a corporation and transferred them to his new corporation, using the new entity as the vehicle for usurping the old corporation’s business opportunities. On those facts, the court found misappropriation.\textsuperscript{6}

On the other hand, a court denied relief to a corporation that claimed its former employee had misappropriated contracting opportunities with former customers: the plaintiff company obtained its customers by submitting competitive bids for discrete jobs and thus had no protectable expectation of an ongoing relationship.\textsuperscript{7} The court held that “the fact that plaintiff has done business with a particular customer in the past does not create a business opportunity which is capable of being appropriated.”\textsuperscript{8}

II. CORPORATE OPPORTUNITY CLAIMS

A. IN GENERAL

§ 92:5  Fiduciary status and the “independence” defense

To be liable for usurping a corporate opportunity, one must be a fiduciary to the corporation. At a minimum, that category includes directors, officers and controlling shareholders, and may extend to employees as well.\textsuperscript{1}

\textsuperscript{4}30 FPS Productions, Inc. v. Livolsi, 68 A.D.3d 1101, 1102, 891 N.Y.S.2d 162, 164 (2d Dep’t 2009).
\textsuperscript{5}30 FPS Productions, Inc. v. Livolsi, 68 A.D.3d 1101, 1102, 891 N.Y.S.2d 162, 164 (2d Dep’t 2009).
\textsuperscript{6}Matter of Greenberg, 206 A.D.2d 963, 965, 614 N.Y.S.2d 825, 827 (4th Dep’t 1994) (noting that the corporation’s customer had been induced to believe there had been a mere change in the name of the business rather than a complete change of corporate identity).
\textsuperscript{7}See Corporate Interiors, Inc. v. Pappas, 2 Misc. 3d 1009(A), 784 N.Y.S.2d 919 (Sup 2004) (stating that a tangible expectancy means “something much more less tenable than ownership, but, on the other hand, more certain than a desire or a hope”).
\textsuperscript{8}Corporate Interiors, Inc. v. Pappas, 2 Misc. 3d 1009(A), 784 N.Y.S.2d 919 (Sup 2004).

[Section 92:5]

\textsuperscript{1}See Alexander & Alexander of New York, Inc. v. Fritzen, 147 A.D.2d 241, 246, 542 N.Y.S.2d 530, 533–34, 4 I.E.R. Cas. (BNA) 776 (1st Dep’t 1989) (stating that the corporate opportunity doctrine applies to “corporate fiduciaries and
§ 92:5  Commercial Litigation in New York State Courts

Because the defendant’s liability depends upon the existence of a duty to the corporation, one defense to a corporate opportunity claim is that the acquiror pursued the opportunity independently, *after* severing ties to the corporation. This is known as the “independence” defense. Similarly, where the opportunity came to the defendant *before* the corporation existed (or before the defendant became associated with the corporation), the independence defense should apply. In addition, fiduciary duties may be disclaimed by agreement if the parties are sophisticated.

But, where an opportunity comes to defendants while they act as officers or directors of a corporation, their resignation will not prevent them from being held accountable for a transaction that had its inception prior to resignation. Similarly, an employee may be held accountable for diverting opportunities acquired through his or her employment, even though those opportunities were not pursued until after the employee had resigned from the

employees”; the “obligation of loyalty” is implied by the employer/employee relationship; see also Laro Maintenance Corp. v. Culkin, 267 A.D.2d 431, 433, 700 N.Y.S.2d 490, 492 (2d Dep’t 1999) (“[the defendants], while employed by [the plaintiff], were bound to exercise good faith and loyalty in the performance of their duties”). But see Radiant Energy Corp. v. Roberts-Gordon, Inc., 225 A.D.2d 1025, 639 N.Y.S.2d 237, 238 (4th Dep’t 1996) (holding that corporate officers did not owe a fiduciary duty that would support a corporate opportunity claim because the corporation failed to show that the officers “had sufficient control over the management of the corporation or exercised the power of a president or chief executive officer”); Tulumello v. W. J. Taylor Intern. Const. Co., Inc., 84 A.D.2d 903, 446 N.Y.S.2d 673, 674 (4th Dep’t 1981) (“Considering that Taylor Co. [the complaining corporation] was a close corporation completely run by Taylor and that Tulumello [the alleged diverter] was only a nominal officer thereof, we find no basis to subject him to the strict fiduciary duty of a responsible officer.”). See generally Chapter 83, “Director and Officer Liability” (§§ 83:1 et seq.) for discussion of fiduciary duties of directors and officers.

*2*Tulumello v. W. J. Taylor Intern. Const. Co., Inc., 84 A.D.2d 903, 446 N.Y.S.2d 673 (4th Dep’t 1981); see also Pangia & Co., CPAs, P.C. v. Diker, 291 A.D.2d 539, 741 N.Y.S.2d 242 (2d Dep’t 2002) (holding that a claim of usurpation of a corporate opportunity was properly disposed of on summary judgment where the defendant was no longer an officer or director of the corporation and, absent a covenant not to compete, owed no fiduciary duty to the plaintiff corporation).


*3.50*Pappas v. Tzolis, 20 N.Y.3d 228, 232, 958 N.Y.S.2d 656, 659, 982 N.E.2d 576, 577 (2012) (dismissing plaintiffs’ claim for breach of fiduciary duty when plaintiffs were sophisticated parties, had a relationship of distrust with the defendant, and knowingly released the defendant from his fiduciary duties).

Resignation from employment will not relieve a corporate officer of the duty not to misappropriate the corporation’s confidential information for personal gain.

§ 92:6 Usurpation of an “opportunity”

Proof that the corporation had a tangible expectancy has been required in many cases to establish the existence of a “corporate opportunity.” The proof that will establish a tangible expectancy necessarily varies with the facts of each case. Examples of evidence that might be sufficient include the following:

- Emails, written correspondence, purchase orders, memoranda, or even handwritten notes showing that the opportunity was originally directed to the corporation, rather than to the individual fiduciary who ultimately acquired it.
- Evidence of negotiations or an agreement in principle under which the corporation would have obtained the opportunity.
- Evidence that the corporation had an expectation, more certain than a desire or a hope, of receiving the opportunity because of an ongoing relationship.

Where the corporation is a diversified conglomerate, that does

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50 FPS Productions, Inc. v. Livolsi, 68 A.D.3d 1101, 1102, 891 N.Y.S.2d 162, 164 (2d Dep't 2009).


[Section 92:6]

1Blaustein v. Pan American Petroleum & Transport Co., 293 N.Y. 281, 300, 56 N.E.2d 705, 713–14 (1944); accord Morales v. Galeazzi, 72 A.D.3d 765, 898 N.Y.S.2d 240, 242 (2d Dep't 2010) (no actionable diversion occurred because corporation “had no tangible expectation” of purchasing property at issue); Rafield v. Brotman, 261 A.D.2d 257, 258, 690 N.Y.S.2d 263, 265 (1st Dep't 1999) (holding that the defendant’s acceptance of employment with the plaintiff’s sole customer did not usurp a corporate opportunity because the possibility that the customer would abandon its plan to create an in-house department and retain the plaintiff’s services did not give rise to a “tangible expectancy” of a continuing business relationship); Howard v. Carr, 222 A.D.2d 843, 845–46, 635 N.Y.S.2d 326, 328 (3d Dep't 1995) (holding that a commercial real estate firm could recover damages for diverted transactions that were “tangible expectancies” of the firm); Gesuale v. Tully, 178 A.D.2d 631, 578 N.Y.S.2d 207, 208 (2d Dep’t 1991).

2See Commodities Research Unit (Holdings) Ltd. v. Chemical Week Associates, 174 A.D.2d 476, 477, 571 N.Y.S.2d 253, 254 (1st Dep’t 1991); see also N.K. Intern., Inc. v. Dae Hyun Kim, 68 A.D.3d 608, 892 N.Y.S.2d 77 (1st Dep’t 2009) (defendant breached fiduciary duty as an employee by secretly diverting purchase orders from his employer to himself and a newly-formed corporation).

3Cf. Corporate Interiors, Inc. v. Pappas, 2 Misc. 3d 1009(A), 784 N.Y.S.2d 919 (Sup 2004) (holding that, where plaintiff had no expectation of an ongoing relationship with each customer once a particular job was finished, such past
§ 92:6  **Commercial Litigation in New York State Courts**

not mean that “all businesses of any nature” fall within its line of business.\(^4\) Some courts, however, have held that so long as the duty of loyalty has been breached, it “need not be proved that the corporation would have availed itself of the business opportunity but for the defendant’s acts.”\(^5\) In such a case, although the plaintiff may establish that the fiduciary was disloyal, there would be no causation and thus no damages (except damages for loss of the fiduciary’s loyal services). The plaintiff presumably would be maintaining the suit to seek punitive damages or forward-looking, prohibitory injunctive relief.

The New York Court of Appeals has not spoken as to whether “tangible expectancy” or some other test is the proper one for determining the existence of a corporate opportunity. Decisions in the Appellate Division have collected the various tests for what opportunities “should be deemed an asset of the corporation” and phrased all the criteria in the alternative.\(^6\) This cobbled-together test leaves plaintiffs capable of pursuing a range of legal and factual theories.

**B. DEFENSES TO CORPORATE OPPORTUNITY CLAIMS**

§ 92:7  **Corporation’s refusal or inability to take advantage of opportunity**

Historically New York courts generally were unwilling to grant

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\(^4\)Maxwell v. Northwest Industries, Inc., 72 Misc. 2d 814, 820, 339 N.Y.S.2d 347, 355 (Sup 1972); compare Turner v. American Metal Co., 268 A.D. 239, 252, 50 N.Y.S.2d 800, 813 (1st Dep't 1944) (holding that the alleged corporate opportunity was “a completely new departure” and the corporation “did not have the fundamental knowledge or practical experience to exploit the venture”).

\(^5\)Bankers Trust Co. v. Bernstein, 169 A.D.2d 400, 401, 563 N.Y.S.2d 821, 822 (1st Dep't 1991); see also O'Hayer v. de St. Aubin, 30 A.D.2d 419, 426, 293 N.Y.S.2d 147, 154 (2d Dep't 1968) (stating that test was whether opportunities for expansion “fell within the normal expectations” of complaining corporations); Foley v. D'Agostino, 21 A.D.2d 60, 67–68, 248 N.Y.S.2d 121, 129 (1st Dep't 1964).

\(^6\)See Alexander & Alexander of New York, Inc. v. Fritzen, 147 A.D.2d 241, 246-50, 542 N.Y.S.2d 530, 533-35, 4 I.E.R. Cas. (BNA) 776 (1st Dep't 1989); see also Coastal Sheet Metal Corp. v. Vassallo, 75 A.D.3d 422, 423, 904 N.Y.S.2d 62, 63-64 (1st Dep't 2010) (holding that the defendant “did not usurp a corporate opportunity belonging to his employer” because his purchase of a competing business was “neither ‘necessary’ for nor ‘essential’ to [his employer’s] line of business and [the employer] had no ‘interest’ or ‘tangible expectancy’ in the opportunity”); Matter of Greenberg, 206 A.D.2d 963, 964, 614 N.Y.S.2d 825, 826 (4th Dep't 1994) (“A corporate opportunity is defined as any property, information, or prospective business dealing in which the corporation has an interest or tangible expectancy or which is essential to its existence or logically and naturally adaptable to its business.”).
relief where the complaining corporation would have been unable or unwilling to avail itself of the opportunity had it been offered.¹ The notion that the corporation must have been able to take advantage of the opportunity rested on the idea that business opportunities are a form of “property” belonging to the corporation. Recently, however, a sharp split among the Appellate Division’s departments on this point has emerged.² When breach of fiduciary duty lies at the heart of a complaint, the First Department has found that a company’s alleged financial inability to avail

¹Blaustein v. Pan Am. Petroleum & Transport Co., 263 A.D. 97, 128, 31 N.Y.S.2d 934, 964 (1st Dep't 1941), judgment aff'd, 293 N.Y. 281, 56 N.E.2d 705 (1944); Hauben v. Morris, 255 A.D. 35, 46–47, 5 N.Y.S.2d 721, 730–31 (1st Dep't 1938), judgment aff'd, 281 N.Y. 652, 22 N.E.2d 482 (1939); Rafeld v. Brotman, 261 A.D.2d 257, 258, 690 N.Y.S.2d 263, 265 (1st Dep't 1999) (holding that there was no usurpation of corporate opportunity where the corporation’s “lack of any viable prospects for the future meant that it no longer had any ‘line of business[.]’ ”); Hewlett v. Staff, 235 A.D.2d 696, 697, 652 N.Y.S.2d 350, 352 (3d Dep't 1997) (holding that the majority shareholders of a corporation did not breach a fiduciary duty owed to the minority shareholder by allowing the corporation’s debts to be sold at a discount because “[t]he debt . . . was a . . . liability, not a corporate asset[,]” and “[t]here are no factual allegations that [the corporation] could have paid off the debt even with the discount”); DiPace v. Figueroa, 223 A.D.2d 949, 951, 637 N.Y.S.2d 222, 224 (3d Dep't 1996) (holding that the shareholder’s purchase of a building and a land housing corporation’s business was not a usurpation of corporate opportunity because the sellers unequivocally stated that they would not have sold to the corporation or the complaining shareholder, but only to the purchasing shareholder).

²Compare Moser v. Devine Real Estate, Inc. (Florida), 42 A.D.3d 731, 735–36, 839 N.Y.S.2d 843, 848 (3d Dep't 2007) (proof that third party would have done business only with the employee or officer individually typically is sufficient to establish that a corporate opportunity did not exist) with Owen v. Hamilton, 44 A.D.3d 452, 454, 843 N.Y.S.2d 298, 302 (1st Dep't 2007), leave to appeal dismissed, 10 N.Y.3d 757, 853 N.Y.S.2d 540, 883 N.E.2d 366 (2008) (finding that director can still be liable for usurping corporate opportunity even if corporation would have been unable to avail itself of the opportunity); see also Jonathan Rosenberg & Kendall Burr, Making Sense of New York’s Corporate Opportunity Doctrine, 80 N.Y. St. B.A.J. 11 (2008) (analyzing the split in the Departments in their treatment of “financial inability” and “refusal-to-deal” as valid defenses to corporate opportunity claim as illustrated in Moser and Owen).
itself of the opportunity is not a valid defense.\textsuperscript{3} This is so even when the company is in serious financial trouble.\textsuperscript{4}

When the defense argues that the corporation would not or could not have pursued the opportunity, the corporate plaintiff may contend that it would have pursued even the riskiest of opportunities. Such backward-looking judgments are impermissible, however. When an enterprise is being launched, the operators and investors take substantial risks. New York courts have been sensitive to the possibility that a plaintiff could remain on the sidelines while a transaction is undertaken, only to assert a corporate opportunity claim after the venture has proven successful. Thus, the courts hold, corporate opportunities must be evaluated “not by hindsight but in the light of the circumstances which presented themselves at the time of the transaction.”\textsuperscript{5} The “ultimate financial success” of a venture is not relevant to “the facts as they existed when the [investment] decision was made.”\textsuperscript{6} “There is no tangible expectancy in a gamble.”\textsuperscript{7}

\section*{§ 92:8 Corporation’s consent or acquiescence}

If the corporation learns that a business opportunity is being diverted by its agent, and either consents to or acquiesces in the agent’s conduct, New York courts will not sustain a cause of ac-

\textsuperscript{3}See Owen v. Hamilton, 44 A.D.3d 452, 454, 843 N.Y.S.2d 298, 302 (1st Dep’t 2007), leave to appeal dismissed, 10 N.Y.3d 757, 853 N.Y.S.2d 540, 883 N.E.2d 366 (2008); accord Foley v. D’Agostino, 21 A.D.2d 60, 68, 248 N.Y.S.2d 121, 129 (1st Dep’t 1964) (“Despite the corporation’s inability or refusal to act it is entitled to the officer’s undivided loyalty. If the two are competitive, the corporation, while not entitled to a general freedom from competition, is entitled to freedom from competition by those charged with the promotion of its interests.”).


\textsuperscript{5}Turner v. American Metal Co., 268 A.D. 239, 251, 50 N.Y.S.2d 800, 812 (1st Dep’t 1944).

\textsuperscript{6}Turner v. American Metal Co., 268 A.D. 239, 251, 50 N.Y.S.2d 800, 812 (1st Dep’t 1944) (noting that alleged corporate opportunity was “honestly considered a speculation and a risk” by corporation’s directors).

\textsuperscript{7}Turner v. American Metal Co., 268 A.D. 239, 251, 50 N.Y.S.2d 800, 814 (1st Dep’t 1944); see also Hayman v. Morris, 46 N.Y.S.2d 482, 496 (Sup 1943) (stating that the “loss of corporate opportunity to do a small loan business in 1935” was not a proper element of damages because its value was “remote and speculative”).
tion on the corporation’s behalf. Full disclosure, even without the corporation’s subsequent consent, may be sufficient to support an agent’s acquisition of a corporate opportunity under some circumstances. Specifically, if the corporation withheld consent after disclosure, it must do so in good faith. For example, in Ackerman v. 305 East 40th Owners Corp., an apartment in a residential cooperative became available when its owner filed for bankruptcy. Ackerman, a resident shareholder and director of the residential cooperative, fully disclosed to the co-op board his intention to bid on the subject apartment. The co-op board did not voice any objection. The apartment was auctioned and Ackerman outbid the co-op board by $1,000. The board subsequently withheld its consent to sell the property to Ackerman. The court viewed the board’s failure to object until several months after the auction as a consent. In some circumstances, even if the defendant’s acquisition of the corporate opportunity has not been disclosed, a corporate opportunity claim may not succeed when the corporation previously permitted the defendant to pursue personal opportunities falling within the corporation’s line of business.

[Section 92:8]

1Gladstone v. Lynn Dinettes, Inc., 140 A.D.2d 487, 488, 528 N.Y.S.2d 599, 599–600 (2d Dep’t 1988); Miller Mfg. Co. v. Zeiler, 72 A.D.2d 338, 342, 424 N.Y.S.2d 225, 228 (1st Dep’t 1980) (holding that, in light of the corporation’s “knowledge, consent and acquiescence,” the corporate opportunity was not wrongfully diverted); Washer v. Seager, 272 A.D. 297, 303, 71 N.Y.S.2d 46, 53 (1st Dep’t 1947), judgment aff’d, 297 N.Y. 918, 79 N.E.2d 745 (1948) (holding that no corporate opportunity was diverted and no fiduciary duty was violated because the plaintiff acquiesced in the termination of his relationship with the defendant and the defendant’s continuation of business with the customer); see also Owen v. Hamilton, 44 A.D.3d 452, 455, 843 N.Y.S.2d 298, 302 (1st Dep’t 2007), leave to appeal dismissed, 10 N.Y.3d 757, 853 N.Y.S.2d 540, 883 N.E.2d 366 (2008) (non-interested director’s consent was binding on the corporation); Blake v. Blake, 225 A.D.2d 337, 638 N.Y.S.2d 632 (1st Dep’t 1996) (holding that the shareholder was estopped from complaining that the sale of property constituted a usurpation of corporate opportunity, where he had knowledge of the transaction and failed to object to it).


5See Alexander & Alexander of New York, Inc. v. Fritzen, 147 A.D.2d 241, 248, 542 N.Y.S.2d 530, 535, 4 I.E.R. Cas. (BNA) 776 (1st Dep’t 1989) (stating that a corporate opportunity would not exist where, “at the beginning of the employment or fiduciary relationship the parties understood, or it is reasonable to conclude that the parties understood, that the employee, officer or director