

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D17486  
G/kmg

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Argued - November 26, 2007

STEPHEN G. CRANE, J.P.  
HOWARD MILLER  
MARK C. DILLON  
RUTH C. BALKIN, JJ.

2006-10281

DECISION & ORDER

Jay Glatzer, appellant, v Yitz Grossman,  
et al., respondents.

(Index No. 5125/06)

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Richard B. Brualdi, New York, N.Y., and Garwin Gerstein & Fisher LLP, New York, N.Y. (Scott W. Fisher of counsel), for appellant (one brief filed).

Heller, Horowitz & Feit, P.C., New York, N.Y. (Stuart A. Blander and Alan A. Heller of counsel), for respondents Yitz Grossman and Emerald Asset Management, Inc.

Wachtel & Masyr, New York, N.Y. (Howard Kleinhandler and Jennifer D. Rolnick of counsel), for respondents Murray Englard, Michael Nafash, and Stuart Ehrlich.

Cooley Godward Kronish LLP, New York, N.Y. (Jason Koral of counsel), for respondent Dennis M. O'Donnell (joining in brief of respondents Murray Englard, Michael Nafash, and Stuart Ehrlich).

In a shareholder derivative action, the plaintiff appeals from an order of the Supreme Court, Nassau County (Jonas, J.), dated September 18, 2006, which granted the motion of the defendants Murray Englard, Michael Nafash, Stuart Ehrlich, and Dennis M. O'Donnell, and the separate motion of the defendants Yitz Grossman and Emerald Asset Management, Inc., to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211.

ORDERED that the order is affirmed, with one bill of costs payable to the defendants

January 15, 2008

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appearing separately and filing separate briefs.

The Supreme Court did not err in dismissing the complaint because of the plaintiff's failure to make a demand on the board of directors of New York Healthcare, Inc. (hereinafter NYHC), to rescind a settlement agreement with the defendants Yitz Grossman and Emerald Asset Management, Inc. (*see* Business Corporation Law § 626[c]). To justify failure to make a demand, it is not sufficient to name a majority of the directors as defendants with conclusory allegations of wrongdoing or control by wrongdoers, as the plaintiff did here (*cf. Bansbach v Zinn*, 1 NY3d 1, 11; *Marx v Akers*, 88 NY2d 189, 199-200).

The court also correctly determined that the director defendants, Murray Englard, Michael Nafash, Stuart Ehrlich, and Dennis M. O'Donnell, are shielded from liability by the exculpatory provision included in NYHC's certificate of incorporation pursuant to Business Corporation Law § 402(b).

The plaintiff's remaining contentions are without merit.

CRANE, J.P., MILLER, DILLON and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court