

Petkanas v Kooyman
2002 NY Slip Op 30057(U)
July 15, 2002
Supreme Court, New York County
Docket Number:
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK
Justice

PART 12

Barbara R. Kapnick

INDEX NO.

103733-4

MOTION DATE

MOTION SEQ. NO.

12

MOTION CAL. NO.

- v -
Robert M. White

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

SCANNED

JUL 22 2002

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 7/15/02

Barbara R. Kapnick

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

BARBARA R. KAPNICK
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X
DEAN PETKANAS,

Plaintiff,

-against-

DECISION/ORDER
Index No. 103733/01
Motion Seq. No. 002

MICHAEL KOOYMAN, THOMAS MANGIONE and
PAUL SHOK,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

Plaintiff Dean Petkanas is a co-founder and the former Chief Operating Officer and Chief Executive Officer of Wintrade, Inc., a licensed broker-dealer. Defendants Michael Kooyman, Thomas Mangione and Paul Shok are members of the board of directors of Wintrade, Inc. and Wintrade Holding Corp., who voted to remove plaintiff as a director of Wintrade Holding and Wintrade, Inc. and to terminate his employment with Wintrade, Inc.¹

Plaintiff seeks in his second amended complaint to recover compensatory and punitive damages, claiming that:

¹ Plaintiff previously filed an arbitration proceeding for breach of contract against Wintrade, Inc. with the American Arbitration Association claiming that he was terminated without justifiable cause in violation of his employment agreement. He also filed an action on behalf of Briarwood Investment Counsel, Inc. against Wintrade to recover the balance due on their contract. However, those actions were stayed after Wintrade and its related Company, Wintrade Holding Corp., filed Chapter 7 bankruptcy petitions on May 21, 2001, the day before the arbitration hearings were scheduled to commence.

i. defendants deliberately, oppressively, maliciously, tortiously and unfairly interfered with and terminated plaintiff's September 15, 1999 written employment contract with Wintrade Inc., in violation of the corporate by-laws and section 708 of the Business Corporation Law (first cause of action);

ii. defendants recklessly, carelessly and negligently performed their duties and responsibilities as directors and, as a result, violated their fiduciary duties as directors of Wintrade, Inc. and Wintrade Holding Corp. (second cause of action);

iii. defendants Kooyman and Mangione willfully, tortiously, maliciously and deliberately conspired to try to cause plaintiff to commit a fraud by falsely creating the conclusion that Briarwood Investment Counsel Inc., of which plaintiff is the president and sole shareholder, owed \$50,000.00 to Wintrade, and that defendant Shok ratified and approved of their acts and statements to induce plaintiff to destroy a June 30, 2000 agreement between Briarwood and Wintrade, as a result of which defendants caused the discharge of plaintiff and the termination of his employment agreement (third cause of action); and

iv. defendants defamed plaintiff by accusing him of committing a fraud and/or criminal acts. Specifically, the complaint alleges that on or about January 29, 2001 and thereafter, Mangione accused plaintiff of fraudulently entering into the

agreement dated June 30, 2000, alleging that Briarwood defrauded Wintrade when the agreement was signed by transferring accounts to Wintrade which Briarwood allegedly did not own (fourth cause of action).

Defendants now move for an order dismissing the complaint with prejudice on the ground that it fails to state a claim upon which relief may be granted and fails to set forth defamatory words on the part of defendant Mangione.

Defendants argue that the first and third causes of action fail to state a tort claim based upon the termination of Petkanas' employment contract since defendants, as directors of the company, were expressly empowered to remove plaintiff as an officer of the company "with or without cause." BCL § 716(a).

Moreover, it is well settled that

[a] "director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken" (Matter of Brookside Mills [Raybrook Textile Corp.], 276 App Div 357, 367). "[A] corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer *** [and did not commit] independent torts or predatory acts directed at another-" (Buckley v 112 Cent. Park South, 285 App Div 331, 334).

Murtha v. Yonkers Child Care Association, Inc., 45 N.Y.2d 913, 915 (1978).

Here, however, plaintiff contends that defendants did, in fact, commit independent tortious acts which subject them to personal liability. Specifically, plaintiff claims that defendants secretly terminated plaintiff's employment without a legal meeting of the board of directors and maliciously accused him of fraud and/or a crime. Plaintiff has thus sufficiently set forth a claim against defendants for tortious interference with his contract.

Defendants further argue that the complaint fails to state a claim for violation of BCL § 708 because plaintiff's employment was terminated and he was removed as Chief Operating Officer of the company pursuant to an Action by Unanimous Written Consent of Director in Lieu of a Meeting dated February 3, 2001, a method specifically authorized by BCL § 708.

However, BCL § 708 authorizes any action required or permitted to be taken by the board without a meeting if all members of the board or the committee consent in writing to the adoption of a resolution authorizing the action only if *not* "otherwise restricted by the certificate of incorporation or the by-laws."

Here, plaintiff contends that defendants failed to comply with Section 3.6 of Wintrade Inc.'s by-laws which provides that "[t]he

board of directors may act without a meeting if, prior to or subsequent to such action, each director consents to such action in writing", since neither he nor another director, Michael Shingelton, gave their written consent to the action without a meeting.

Defendants, however, argue in reply that (i) the decision to remove the Board of Directors of Wintrade Holding, including Petkanas, was supported by the holders of a majority of the shares of Wintrade Holding, a Delaware corporation, (ii) that the action taken without a meeting on February 3, 2001 was in conformity with Del. Gen. Corp. L. § 228 and Section 2.8 of Wintrade Holding's by-laws, and (iii) that the newly installed board of Wintrade Holding had the authority to remove the board of its wholly-owned subsidiary, Wintrade Inc. on that same day. Defendants thus contend that plaintiff was no longer a member of the board of directors of Wintrade, Inc. on February 3, 2001 and that plaintiff's consent to the action taken on that date was not required.

However, this Court cannot determine from the papers submitted whether or not the actions taken were in conformity with the respective corporations' by-laws and there appears to be at least an issue *of* fact as to whether or not there was full compliance with the letter and intent of the notice provisions of Section 2.8 of Wintrade Holding Corp.'s by-laws.

Accordingly, based on the papers submitted and the oral argument held on the record on January 30, 2002, that portion of the motion seeking to dismiss the first cause of action must be denied.

However, that portion of defendants' motion seeking to dismiss the third cause of action for failure to state a claim for conspiracy for fraud is granted, as this Court finds that the complaint fails to sufficiently state a claim for fraud, since it fails to demonstrate the requisite nexus between the alleged fraud and the damages which were allegedly caused by such fraud. See, generally, Meqaris Furs, Inc. v. Gimbel Brothers, Inc., 172 A.D.2d 209 (1st Dep't 1991); CPLR § 3016. As a result, there is no independent tort of fraud to provide a basis for plaintiff's conspiracy claim. See, Small v. Lorillard Tobacco Co., 94 N.Y.2d 43 (1999). See also, Dean R. Pelton Co., Inc. v. Moundsville Shopping Plaza, Inc., 173 A.D.2d 201 (1st Dep't 1991).

Defendants next move to dismiss the second cause of action for failure to state a claim for individual or derivative relief. This portion of the motion is granted since allegations of mismanagement by officers or directors of a corporation "plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually (citations omitted)." Abrams v. Donati, 66 N.Y.2d 951, 953 (1985), rearg. denied 67 N.Y.2d 758 (1986).

Finally, defendants move to dismiss the fourth cause of action for failure to state a claim for defamation. Plaintiff's second amended complaint fails to set forth the particular words allegedly uttered by defendant Mangione. See, Dillon v. City of New York, 261 A.D.2d 34 (1st Dep't 1999). Moreover, the complaint fails to allege malice with respect to the defamation allegedly committed by defendant Kooyman. See, Sborqi v. Green, 281 A.D.2d 230 (1st Dep't 2001).

Accordingly, this branch of the motion is granted to the extent of dismissing the fourth cause of action with leave to replead, if deemed appropriate. Plaintiff shall serve a Third Amended Complaint within 30 days of service of a copy of this order with notice of entry, in conformity with this decision. Defendants shall serve an answer or otherwise move with respect to said complaint within 20 days of service of said complaint.

A preliminary conference shall be held in IA Part 12 on October 9, 2002 at 9:30 a.m.

This constitutes the decision and order of this court.

Dated: July 13th, 2002



BARBARA R. KAPNICK
J.S.C.