

Hon Fui Hui v East Broadway Mall, Inc.

2006 NY Slip Op 30776(U)

June 27, 2006

Supreme Court, New York County

Docket Number: 109362/05

Judge: Marilyn Shafer

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----x.
HON FUI HUI, MAN WING WONG and
TIEH CHI HO,

Index No. 109362/05

Plaintiffs,

- against -

EAST BROADWAY MALL, INC., TRIPLE 8
PALACE, INC., DOUBLE 8 PALACE, INC.,
KWOK MING CHAN and GRACE CHAN,

Defendants.
-----x

MARILYN SHAFER, J.:

Defendant Sun Yue Tung Corp. s/h/a Double 8 Palace, Inc. ("Sun Yue Tung"), moves, pursuant to CPLR 3211(a)(7), to dismiss the Complaint in this action to set aside the assignment of a lease agreement.

Background

Plaintiffs, Hon Fui Hui, Man Wing Wong and Tieh Chi Ho, shareholders of defendant East Broadway Mall Inc. ("EBM"), commenced this action against defendants alleging, *inter alia*, misconduct by defendants Kwok Ming Chan and Grace Chan (the "Chans"), directors and officers of EBM, and seeking to set aside the assignment of a lease from defendant Triple 8 Palace, Inc. ("Triple 8") to Sun Yue Tung.

The Complaint includes the following factual allegations. Plaintiffs own 30% of the outstanding shares of EBM, a New York corporation formed in 1984. The Chans own the remaining 70% of EBM's outstanding shares. In 1985, EBM successfully bid on the premises known as 55-79 Division Street a/k/a 88 East Broadway,

FILED
JUL 2 0 2006
CLERK OF SUPREME COURT
NEW YORK COUNTY

001

New York, New York ("the premises") and entered into a 50-year lease with the City of New York for said premises. Thereafter, EBM constructed a shopping mall on the premises.

By Lease, dated September 22, 1988, EBM rented the second floor of the premises to Triple 8, a Chinese restaurant, for a 15-year term. In 1991, the Chans acquired 100% of the outstanding shares of Triple 8. Thereafter, EBM reportedly agreed to a downward modification of the rent due from Triple 8 and forgave other obligations owed by Triple 8. In addition, by Consent to Assignment and Assumption of Lease, dated August 8, 2002, EBM consented to the assignment of the lease from Triple 8 to Sun Yue Tung.

Plaintiffs commenced this action seeking to set aside the lease assignment and an accounting from the Chans. Plaintiffs essentially allege that the lease assignment is invalid since it violated a June 1992 EBM resolution requiring the consent of 75% of the shareholders for such transaction, and that by participating in the transaction, the Chans breached their fiduciary duties to plaintiffs. Plaintiffs also allege that the challenged transaction is part of a scheme by the Chans to enrich themselves at the expense of plaintiffs and EBM, in violation of their duties as directors and officers of EBM, and that as a result of the transaction, the Chans improperly retained benefits belonging to EBM.

Issue was joined as to EBM with the filing of an answer generally denying the allegations in the Complaint and asserting several affirmative defenses.

Sun Yue Tung now seeks to dismiss the Complaint for failure to state a cause of action.

Discussion

On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

As stated, plaintiffs seek to set aside the lease assignment and an accounting, alleging violation of a corporate resolution requiring the consent of 75% of the shareholders for major transactions and breach of fiduciary duties by the Chans, as directors and officers of EBM, by participating in the unauthorized assignment for their own enrichment and at the expense of plaintiffs and EBM.

Even construed in the most favorable light, the action must be dismissed insofar as it is based on the alleged wrongdoing in connection with the challenged transaction since plaintiffs lack standing to sue in their individual capacity. As stated, the Complaint alleges that the lease assignment violated a June 1992 EBM resolution requiring the consent of 75% of the shareholders for such transaction, that the Chans breached their duties as directors and officer of EBM by participating in said transaction solely to enrich themselves at the expense of plaintiffs and EBM.

The rule is clear that a shareholder has no individual cause of action for a wrong against a corporation (*Abrams v Donati*, 66 NY2d 951, 953 [1985]). Of course, exceptions to that rule have been recognized where the wrongdoer breached a duty owed to the shareholder independent of any duty owing to the corporation wronged (*id.*). However, allegations of misconduct by officers or directors for their own enrichment without more, constitute a wrong against the corporation only, for which a shareholder may sue derivatively but not individually (*see id.*).

Plaintiffs attempt to circumvent their lack of standing to bring this action by asserting that the action is being brought derivatively, pursuant to Business Corporation Law §626, and as an action against directors and officers for misconduct, pursuant to Business Corporation Law §720. However, the facts alleged in the pleadings do not support plaintiffs' position or set forth

viable claims under either section of the Business Corporation Law.

A shareholders' derivative action is an action "brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates" (Business Corporation Law §626[a]). "Derivative claims against corporate directors belong to the corporation itself" (*Auerbach v Bennett*, 47 NY2d 619, 631 [1979]).

The remedy sought is for wrong done to the corporation; the primary cause of action belongs to the corporation; recovery must enure to the benefit of the corporation. The stockholder brings the action, in behalf of others similarly situated, to vindicate the corporate rights and a judgment on the merits is binding adjudication of these rights

(*Isaac v Marcus*, 258 NY 257, 264 [1931][internal citations omitted]).

In addition, in any derivative action, the complaint must "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reason for not making such effort" (Business Corporation Law §626[c]). Demand is excused for futility when a complaint alleges with particularity (1) that a majority of the board of directors is interested in the challenged transaction; (2) that the board of directors did not full inform them about the challenged transaction to the extent reasonably appropriate under the

circumstances; or (3) that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors (*Bansbach v Zinn*, 1 NY3d 1, 9 [2003][internal citations omitted]).

Here, plaintiffs maintain that they commenced this action, on behalf of EBM, against Triple 8 and Sun Yue Tung to set aside the unauthorized assignment, and against the Chans, as directors and officers of EBM, for violation of their duties to EBM and for the damage to EBM resulting from the waste and diversion of corporate assets. Plaintiffs further assert that a demand on the board of directors of EBM to prosecute this action would be futile since the Chans control EBM and they have acted in bad faith and in violation of their duties to plaintiffs by entering into the challenged transaction. However, it is well established that "[s]imply naming a majority of the board as defendants with conclusory allegations of wrongdoing or control is insufficient to circumvent the requirement of demand" (*Bansbach v Zinn, supra*, at 11). Thus, plaintiffs cannot properly pursue a claim under §626 of the Business Corporation Law.

Nor do plaintiffs state a valid claim under §720. Section 720(a)(2) provides, in part, that "[a]n action may be brought against one or more directors or officers of a corporation to procure a judgment ... [t]o set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness." Thus, §720(a)(2), authorizes an

action to set aside an unlawful conveyance, assignment or transfer of corporate assets where the transferee knew of its unlawfulness (*Bertoni v Catucci*, 117 AD2d 892, 894 [3d Dept 1986]).

Here, plaintiffs assert that the unauthorized lease assignment presumably occurred in connection with the sale of Triple 8 by the Chans, allowing the Chans to reap a personal profit from the transaction. However, the pleadings are devoid of any factual allegations that the transferee, Sun Yue Tung, knew of the alleged unlawfulness of the transaction. Thus, dismissal of the \$720 claim is also appropriate.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated:
6/27/06

FILED
JUL 20 2006
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J. S. C.
HON. MARILYN SHAFER, JSC