

Wandel v Eisenberg

2007 NY Slip Op 31270(U)

May 3, 2007

Supreme Court, New York County

Docket Number: 0603665/2006

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
Charles Edward Ramos **53**

PRESENT: _____
Justice

PART _____

Index Number : 603665/2006

WANDEL, ARNOLD

vs
EISENBERG, WARREN

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAY 18 2007

Motion is decided in accordance with the
accompanying Memorandum Decision
COUNTY OF NEW YORK
CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/9/07


HON. CHARLES E. RAMOS
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
ARNOLD WANDEL, Derivatively on Behalf of
Nominal Defendant BED BATH & BEYOND INC.,

Plaintiff,

Index No. 603665/06

-against-

WARREN EISENBERG, LEONARD FEINSTEIN,
STEVEN H. TEMARES, ARTHUR STARK,
MATTHEW FIORILLI, RONALD CURWIN,
EUGENE CASTAGNA, ROBERT S. KAPLAN,
DEAN ADLER, VICTORIA MORRISON, FRAN
STOLLER, KLAUS EPPLER, STEVEN [sic]
BARSHAY, JORDAN HELLER, and ESTATE
OF ROBERT J. SWARTZ,

Defendants,

BED BATH & BEYOND INC.,

Nominal Defendant.

-----X

FILED
MAY 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Charles Edward Ramos, J.S.C.:

Defendants, officers and current/former members of the board of directors of Bed Bath and Beyond Inc. ("BBB"), move pursuant to CPLR 3211 (a) (1), 3211(a) (7), and Business Corporation Law ("BCL") § 626(c), to dismiss the Amended Complaint of plaintiff, Arnold Wandel, suing derivatively on behalf of nominal defendant BBB.

Background

On January 4, 2007, plaintiff filed an Amended Complaint against the board of directors¹ and officers² of BBB seeking

¹ Defendants on the board of directors of BBB are as follows: Robert S. Kaplan, Dean Adler, Victoria Morrison, Fran Stoller, Klaus Eppler, Steven [sic] Barshay, Jordan Heller, Robert J. Swartz(deceased 2001).

² Defendants that are officers of BBB are as follows: Arthur Stark, Matthew Fiorilli, Ronald Curwin, Eugene Castagna, Warren Eisenberg, Leonard Feinstein, Steven H. Tamares.

damages for alleged violations of fiduciary duties, unjust enrichment, gross mismanagement, and corporate waste.

The complaint alleges that the named defendants are liable to BBB for taking part in a stock option backdating scheme, that allowed Eisenberg, Feinstein, and Tamares to attain higher values on their stock options by changing the exercise price (the purchase price of the stock on the date issued), to a more financially advantageous date (with a lesser exercise price) in order to make gains after it is known that the stock price had risen. This scheme is alleged to have occurred over the past 14 years costing BBB millions of dollars.

On June 5, 2006, Merrill Lynch issued a report that included BBB on a list of companies that showed increases in share trading prices subsequent to stock option grant dates. A similar report was issued by Deutsche Bank on June 14, 2006. On June 19, 2006, the Board appointed an "independent special committee"³ ("Special Committee") to investigate the matter. On June 20, 2006, the committee retained the firm of Weil, Gotshal & Manges, LLP ("Weil Gotshal") as independent legal counsel to conduct an investigation. On June 25, 2006, Weil Gotshal engaged Navigant Consulting, Inc. to serve as independent accounting experts. After an extensive investigation, the Special Committee generated a detailed report. The report confirmed evidence of backdating of options, however backdating was deemed to have been

³ The Committee was comprised of defendants, Jordan Heller and Steven Barshay.

unintentional. On September 20, 2006, BBB voluntarily reported its findings to the Securities Exchange Commission ("SEC"). On October 10, 2006, BBB made the report public.

Based on the review of the report, the Special Committee recommended that the Company reform its policy with regard to stock option grants by adopting a number of new controls. BBB adopted the recommended reforms. Additionally, BBB is revising the dates of certain option grants, pursuant to applicable accounting principles. BBB has determined through a financial analysis, that there were no material changes to its financial condition in any relevant period. Therefore, BBB need not restate its historical financial statements. However, BBB will record an adjustment of approximately \$65 million in the equity section of its consolidated balance sheet for the fiscal year ending March 3, 2007. This adjustment will cover the aggregate of "non-material" charges in the prior fourteen years. BBB will also record a \$7.2 million charge in its third quarter income statement covering the first three quarters of the current fiscal year.

In December 2006, BBB reset the price of all unvested options, increasing the exercise price on the dates the Special Committee had determined to be the appropriate measurement dates. Due to this adjustment affecting not only executives, but lower-level employees as well, BBB has agreed to repay the price differential to the latter. The executives will not receive such repayment.

Legal Standards

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Whether a plaintiff can ultimately prove its allegations is not part of the calculus in determining a motion to dismiss. *Id.* The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

"Dismissal under CPLR 3211(a)(1) is warranted 'only if the documentary evidence submitted conclusively established a defense to the asserted claims as a matter of law.'" *Id.*, quoting *Leon supra* at 88.

BCL § 626(c) provides that in a shareholders' derivative action "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort."

Discussion

As a preliminary matter, in opposing defendants' motion to dismiss, plaintiff does not address any of the remedial actions that BBB has undertaken in response to the Special Committee's recommendations as well as the monetary adjustments made to stock

option grants. Nor does plaintiff address or argue any possible inadequacy of the remedial actions. BBB's voluntary actions could render plaintiff's complaint moot.

In any event, defendants' motion to dismiss the Amended Complaint is granted because plaintiff failed to make a demand on the Board, and board futility was not pled with particularity in accord with BCL § 626(c).

Generally:

"the demand requirement rests on basic principles of corporate control--that the management of the corporation is entrusted to its board of directors who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts. The demand requirement thus relieves courts of unduly intruding into matters of corporate governance by first allowing the directors themselves to address the alleged abuses." *Bansbach v Zinn*, 1 NY3d 1,8 (2003) (internal citation omitted).

A demand by a shareholder that the corporation initiate an action would be futile if a complaint alleges with particularity that (1) a majority of the directors are interested in the transaction, (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction. *Marx v Akers*, 88 NY2d 189, 198 (1996).

Defendants correctly contend that plaintiff failed to make a demand on the Board of Directors and failed to allege with particularity that such a demand would have been futile. Paragraphs 60, 61, 63 of the Amended Complaint set forth the plaintiff's reasoning why a demand on the Board would have been futile.

60. "...demand would be futile and useless act because the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute the action."
61. (b) "...as members of the Stock Option Committee, they directly participated in and approved the misconduct alleged herein and are substantially likely to be held liable for breaching their fiduciary duties...Moreover, by colluding with Officer Defendants...(they) have demonstrated that they are unable or unwilling to act independently..."
- (c) "...as a [sic] members of the Compensation Committee, they directly participated in and approved the misconduct alleged herein and are substantially likely to be held liable for breaching their fiduciary duties...Moreover, by colluding with Officer Defendants...(they) have demonstrated that they are unable or unwilling to act independently..."
- (d) "...as members of the Audit Committee they directly participated in and approved the misconduct alleged herein and are substantially likely to be held liable for breaching fiduciary duties...Moreover, by colluding with the Officer Defendants...(they) have demonstrated that they are unable or unwilling to act independently..."
- (e) "...as directors of the Company, they directly participated in and approved the filing of false financial statements and other SEC filings...Moreover, by colluding with the Officer Defendants and others...(they) have demonstrated that they are unable or unwilling to act independently..."
63. "Furthermore, demand is excused because the misconduct complained of herein was not, and could not have been, an exercise of good faith business judgment."

As the Court of Appeals held in *Marx supra*, "It is not sufficient, in a shareholder's derivative action, merely to name a majority of the directors as parties defendant with conclusory allegations of wrongdoing or control by wrongdoers to justify failure to make a demand." *Id* at 199-200. "The statute requires that the complaint shall set forth with particularity the reasons

for not making such effort." Id.

It is undisputed that the three directors (Eisenberg, Feinstein, and Tamares) that personally benefitted from backdating stock options are "interested" in the transaction. However, what is lacking in plaintiff's allegations is why the seven other directors were interested in the backdating of stock options. As *Marx* instructs, conclusory allegations as to director control or wrongdoing is insufficient to satisfy BCL § 626 particularity requirement. The mere presence of directors on committees is not particular as to their individual participation or alleged collusion with interested directors in the backdating of stock options.

Furthermore, with regard to demand futility, the Amended Complaint is deficient as to how the directors allegedly failed to inform themselves to a degree reasonably necessary about the transaction, or how directors allegedly failed to exercise their business judgment in approving the transaction.

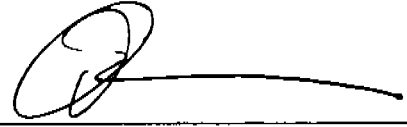
As to the former, the complaint is completely silent on the directors' failure to keep fully informed. As to the latter, although paragraph 63 above, is on point, this broad conclusory allegation is patently insufficient to pass muster under BCL § 626. "Demand is excused because of futility when a complaint alleges with particularity 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." *Marx* at 200. The complaint fails to address any egregiousness act in support of

demand futility.

Accordingly,

It is ORDERED, that defendants' motion to dismiss the Amended Complaint is hereby granted.

Dated: May 3, 2007



J.S.C.
HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

FILED
MAY 18 2007
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