

Stamack, Inc. v Gordon
2007 NY Slip Op 31646(U)
June 12, 2007
Supreme Court, New York County
Docket Number: 0118876/2006
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Index Number : 118876/2006

STAMACK

vs

GORDON, DANIEL

Sequence Number : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE 5/8/07

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
JUN 15 2007
COUNTY CLERKS OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM/ DECISION

Dated: 6/12/07

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
STAMACK, INC.,

Plaintiffs,

Index No. 118876/00

-against-

DANIEL GORDON, LAURA E. GORDON, FRIENDLY
GHOST ENTERPRISES, LLC, and FPB FUNDING, LLC,

Defendants.

-----X
Hon. Richard B. Lowe, III:

Defendants move pursuant to CPLR 3211(a) for an order dismissing the complaint in this action on the basis that the Plaintiff Stamack, Inc. (“Stamack”) lacks standing to sue because the ultimate relief requested would benefit non-party David McWilliams (“McWilliams”), a 50% shareholder in Stamack, rather than benefit the Plaintiff.

Background

In the complaint, Stamack alleges that defendant Daniel Gordon (“Gordon”), acting through an alleged alter ego, defendant Friendly Ghost Enterprises LLC (“FG”), improperly acquired a 50% interest in Stamack. Specifically, the complaint asserts that Gordon, acting through Defendant FPB Funding, LLC (“FPB”), made a series of loans to Stamack’s predecessor, with FPB obtaining, pursuant to an Amended Conversion Agreement, the right to convert any unpaid loan balance into warrants to purchase shares of the Company. FPB’s outstanding loan position of \$455,001.56 was converted into warrants that were transferred to FG who in turn converted them into 100 shares of Stamack. Once a third shareholder was bought out, FG’s 100

shares were enough to render it a 50% owner of Stamack, with McWilliams being the other 50% owner.

According to the complaint, FG was not entitled to convert its warrants into shares of the company because prior to that conversion most of the outstanding balance on the loan was repaid when Gordon allegedly transferred \$400,000 of Stamack's funds to a company he controlled. Thus, according to the complaint, since the lender's only right to exercise the warrants derived from the existence of an outstanding loan balance, and since only a small loan balance remained at the time, FG was not entitled to warrants that would allow it to receive 100 shares of Stamack, but was only entitled to a minor ownership interest.

The complaint seeks declaratory judgments declaring that \$400,000 of the loan balance was paid and that the exercise of warrants was improper, thereby declaring FG is entitled to only 4.11% of the shares of Stamack's stock. It also seeks an order imposing a constructive trust on all shares of Stamack held by FG in excess of the 4.11%.

Defendants move to dismiss the complaint arguing that all of the relief sought in this action is solely for the benefit of McWilliams, the only shareholder of Stamack other than FG. The effect of the relief requested would not change Plaintiff Stamack's rights or interest, but would rather recast McWilliams' stock ownership to approximately 96% of Stamack's outstanding shares. The defendants argue that McWilliams is not entitled to bring this action on behalf of Stamack and therefore use the corporate treasury to press his position.

Discussion

For a shareholder to bring suit on behalf of a corporation, he/she must establish that any recovery will flow to the corporation (*Tooley v Donaldson, Lufkin & Jenrette*, 845 A2d 1031

[Del. 2004]). A stockholder who is directly injured retains the right to bring an individual action for injuries affecting his or her legal rights as a stockholder, and such a claim is distinct from an injury caused to the corporation alone (*Id* at 1036). If the recovery flows directly to an individual shareholder, then a suit on behalf of the individual must be brought. (*Id* at 1035)(to determine whether claims are individual or derivative, a court “must look to the nature of the wrongs alleged in the body of the complaint, not to the plaintiffs’ designation or stated intention).

The relief sought in this action is solely for the benefit of McWilliams, the only shareholder of Stamack other than Friendly Ghost. The first cause of action is a declaratory judgment that the \$400,000.00 was paid by Stamack. This is not an action to recover monies on behalf of the corporation, nor is it an action for conversion as the plaintiff’s opposition brief appears to characterize it (*Plaintiff’s Brief in Opposition*, p 6). There is no recovery to the corporation via this litigation. Ultimately, the purpose of this action is to seek a declaration that Friendly Ghost is not the owner of 50% of Stamack’s stock, and to have the court remedy the situation by imposing a constructive trust. The effect of such an action would not be to change Stamack’s rights or interest, but rather to recast McWilliams’ stock ownership to approximately 96% of Stamack’s outstanding shares. The relief requested in the complaint are not of concern to Stamack, but rather to McWilliams who seeks a judgment which will ultimately determine him to be Stamack’s majority owner or , in the alternative, a 50% owner with Friendly Ghost. McWilliams is the party who stands to benefit from the relief sought in the complaint and therefore this action should be dismissed in favor of an individual action.

Furthermore, an action cannot be maintained in the name of corporation because there was no majority vote by the board of directors(8 *Del. C.* § 141(b)(“The vote of the majority of

the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or by laws shall require a vote of a greater number"). In the case of Stamack, there are only two directors. The minutes of an October 18, 2006 meeting show that both directors were present and one voted in favor of this action and the other did not (*See, Plaintiff's Order to Show Cause Seeking a Receivership*, Exhibit 21). Because there was no majority vote at the meeting, the action cannot be maintained (*In re Chelsea*, 18 Del. Ch. 287, 296 [Del. Ch. 1932])(evenly split vote does not constitute a decision by the board).


Conclusion

Therefore, based on the foregoing,

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

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 12, 2007

ENTER


JISC
HON. RICHARD B. LOWE, III

[**FILED**
JUN 15 2007
COUNTY CLERK'S OFFICE
NEW YORK