

<b>Aranca US, Inc. v Badruswamy</b>
2007 NY Slip Op 33123(U)
October 1, 2007
Supreme Court, New York County
Docket Number: 0600571/2007
Judge: Leland G. DeGrasse
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LELAND DeGRASSE  
Justice

PART 25

Index Number : 600571/2007

INDEX NO. 600571/07

ARANCA US, INC.

MOTION DATE 5/31/07

vs

BADRUSWAMY, SHIVA

MOTION SEQ. NO. 003

Sequence Number : 003

MOTION CAL. NO. 2

DISMISS

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

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.**

OCT 01 2007

Dated: \_\_\_\_\_

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 : STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 25

----- X  
ARANCA US, INC., :  
 :  
 Plaintiff, :  
 :  
 -against- :  
 :  
 :  
 SHIVA BADRUSWAMY, SEEMA ADVANI and :  
 ACCUSERVE, INC., :  
 :  
 Defendants. :  
----- X

Index No.: 600571/07  
Cal. No. 2 of 5/31/07

DeGRASSE, J.:

Defendants Shiva Badruswamy, Seema Advani and Accuserve, Inc. (“Accuserve”) move for an order dismissing the complaint based on the grounds that a defense is founded on documentary evidence (CPLR3211 [a] [1]), plaintiff lacks standing or capacity to maintain this action (CPLR 3211 [a] [3]), and the complaint fails to state a cause of action (CPLR 3211 [a] [7]).

Plaintiff Aranca US, Inc. (“Aranca US”) is a closely held corporation engaged in the business of providing economic research and analysis services. On February 23, 2007, Aranca US, by Hemendra Aran (“H. Aran”), in his capacity as chief executive officer, commenced the instant action against defendants asserting causes of action sounding in, *inter alia*, breach of fiduciary duty, fraud and conversion. The underlying complaint alleges that defendants have engaged in various improper acts. In particular, it is alleged that Badruswamy is using his position as director to improperly enrich defendants by fraudulently diverting monies from Aranca US to Accuserve, and that Seema Advani, Badruswamy’s wife, is the sole director of Accuserve.

Turning first to the branch of the motion seeking dismissal for lack of standing, defendants contend that plaintiff does not have authorization to maintain this action on behalf of Aranca US, and has otherwise failed to comply with the prerequisites of bringing a derivative action under Business Corporation Law §626 by demonstrating that it made a demand on the board of directors to pursue the alleged claims. A shareholder, even a sole shareholder or one in a closely held corporation, lacks standing to sue for injuries to the corporation itself (*Lawrence Ins. Group v KPMG Peat Marwick L. L. P.*, 5 AD3d 918, 919 [2004]). In his affidavit in support of the motion, Badruswamy states that in December 2003, he formed Aranca US, a New York domestic corporation pursuant to Business Corporation Law §402, to provide economic research and analysis on an outsourcing basis. Upon the formation of Aranca US, Badruswamy was issued all of its 200 shares of outstanding stock and, thus, became the sole director and chief executive officer/president of Aranca US. According to Badruswamy, in November 2005, Aranca US entered into contractual relations with non-party Aranca (Mumbai) Private Limited ("Aranca Mumbai"), an Indian outsourcing company engaged in the same business as Aranca US. Pursuant to a Share Purchase Agreement, Aranca Mumbai purchased all of Badruswamy's 200 shares of common stock in Aranca US, thus making Aranca Mumbai the sole shareholder of Aranca US. In return, Badruswamy received a seventeen percent interest in Aranca Mumbai, and become a director and shareholder of the umbrella company. Badruswamy claims that he is and continues to be the sole director and chief executive officer of Aranca US. Badruswamy additionally claims that the bylaws of Aranca US provide that no action may be taken on behalf of Aranca US, except by its board of directors and/or officers. As such, Badruswamy argues that since he did not authorize the institution of this action, it may not be maintained.

In his opposing affidavit, H. Aran refers to his status as officer and director of Aranca US, and director of Aranca Mumbai. H. Aran asserts that while he acknowledges, for purposes of this motion, that Badruswamy can be deemed to have been acting as an executive and director of Aranca US for a limited time, there was never a board meeting convened or a resolution passed so appointing him because as a closely held corporation, Aranca US had a practice of acting informally. H. Aran claims that Badruswamy has never served as the sole director of Aranca US, and any authority that he may have had, terminated prior to the commencement of this action. H. Aran further claims that the board of directors of Aranca US consists of five members, which include H. Aran, Madhusudan Rajagopalan, Peter Read, Arun Shekhar Aran ("A. S. Aran"), and Jonathan Wu. According to H. Aran, three of the directors (H. Aran, Rajagopalan, and A. S. Aran) have ratified the commencement of this action. In support of his contentions, H. Aran submits copies of the following:

1. The bylaws that H. Aran received from Badruswamy upon the formation of Aranca US. (H. Aran claims that defendants have annexed a different set of bylaws to their moving papers).
2. An organization action letter, dated December 24, 2003, which states that Read, A. S. Aran, and Wu are elected to serve as the directors of Aranca US "until the first annual meeting of shareholders."
3. A Share Purchase Agreement, executed by Badruswamy and Rajagopalan (in his capacity as director of Aranca Mumbai) on June 30, 2005, which states that the present directors of Aranca Mumbai are H. Aran and Rajagopalan, and the present directors of Aranca US are Read, A. S. Aran and Wu. (Plaintiff claims that this agreement gave Aranca Mumbai the power to modify the composition of the board of directors of Aranca US, and to also control its management).
4. A corporate resolution passed at the January 3, 2006 meeting of the board of directors of Aranca Mumbai which states that "[H. Aran] and [Rajagopalan], [d]irectors of the [c]ompany ... are hereby nominated as [d]irectors on the

[b]oard of [Aranca US].”

5. A corporate banking resolution executed by H. Aran and Badruswamy in their capacities as director of Aranca US on October 30, 2006.
6. The minutes of the January 11, 2007 meeting of the board of directors of Aranca Mumbai which was attended by H. Aran, Rajagopalan and Padma Kapse, and which state that “[H. Aran] and [Rajagopalan], [d]irectors of the [c]ompany ... are hereby authori[z]ed to take appropriate action to resolve the matters related to [Badruswamy] including legal action.”
7. The minutes of the January 18, 2007 meeting of the board of directors of Aranca US, which was attended by H. Aran and Rajagopalan, and which state that “the executive powers of [Badruswamy] for looking after the day-to-day affairs of the [c]ompany including the powers to operate the [b]ank account of the company, be and are hereby withdrawn with immediate effect ....”
8. A letter that H. Aran sent to Badruswamy on January 24, 2007, informing him that his executive powers and authorities were suspended “with immediate effect.”
9. The minutes of the January 25, 2007 special meeting of Aranca US, which was attended by H. Aran and Ravi Prakash, in their capacities as authorized representative of Aranca Mumbai and company executive of Aranca US, respectively. The minutes state that “[t]he [s]hareholder considered various anti-company acts and deeds of [Badruswamy], who has been nominated by the [s]hareholders to be the [d]irector of [Aranca US],” and that in view of Badruswamy’s “malafide acts and deeds,” he “is hereby removed from the [d]irectorship of the [c]ompany and shall henceforth cease to be a [d]irector of [Aranca US].” The minutes further state that “[t]he shareholder ... decided that the [c]ompany should take the required legal steps against [Badruswamy] for his various malafide and anti-company acts and deeds.”
10. The affidavits of Rajagopalan and A. S. Aran stating that they were directors of Aranca US at the time that this action was commenced and remain directors of Aranca US. As such, they “[have] been made aware of the allegations against defendant Badruswamy for breach of fiduciary, fraud and conversion prior to the filing of this lawsuit and ... fully support Aranca US’s initiation of this action against defendant Badruswamy.”

In reply, defendants assert, *inter alia*, that the Share Purchase Agreement which H. Aran claims authorizes him to elect himself and others as directors of Aranca US is invalid. In particular,

defendants contend that under paragraph D (1) of the Share Purchase Agreement, Aranca Mumbai's power to modify the composition of the board of directors of Aranca US and to also control its management, was to take effect "[s]imultaneous to the registration of shares in [Aranca Mumbai's] name." As such, defendants argue that the Share Purchase Agreement is invalid because new shares of stock were never issued or registered in Aranca Mumbai's name as can be seen from the blank stock certificates annexed to plaintiff's opposition papers. Thus, defendants argue that the alleged appointment of directors by plaintiff is void as a matter of law.

The court finds that plaintiff lacks standing to sue on behalf of Aranca US. Although the parties have submitted what appears to be different bylaws, a review of the parties' submissions reveals that the following relevant bylaw provisions are identical in meaning:

Section 6 of Article I of plaintiff's bylaws and Section 7 of Article II of defendants' bylaws provides that "Each share [of stock] shall entitle the holder to one vote. In the election of directors, a plurality of the votes cast shall elect. Any other action shall be authorized by a majority of the votes cast ... except where the ... Business Corporation Law provides otherwise."

Section 1 of Article II of plaintiff's bylaws and Section 4 of Article III of defendants' bylaws provides that the business of the corporation is to be managed by its board of directors.

Section 3 of Article II of plaintiff's bylaws and Section 2 of Article III of defendants' bylaws provides that the first board of directors shall be elected by the incorporator and shall hold office until the first annual meeting of shareholders. Thereafter, directors are to be elected "at an annual meeting of the shareholders."

Section 4 of Article II of plaintiff's bylaws and Section 6 of Article III of defendants' bylaws provides that a majority of the entire board of directors "shall constitute a quorum" and the vote of the majority of directors present at a meeting at which a quorum is present shall be "the act of the [b]oard."

Here, it is alleged that a meeting of Aranca Mumbai's board of directors was held on January 3, 2006, during which a resolution was duly adopted appointing H. Aran and Rajagopalan directors of Aranca US. Since the bylaws of Aranca US provide that directors are to be elected "at an annual meeting of the shareholders" of Aranca US (not Aranca Mumbai), the court finds that H. Aran and Rajagopalan's status as directors of Aranca US is invalid.

Additionally, the affidavit of A. S. Aran stating that he has held the position of director since the formation of Aranca US on December 24, 2003, and that he fully supports the initiation of this action on behalf of Aranca US, is insufficient to ratify the commencement of this lawsuit. Under the bylaws, an act by the board of directors shall be by a vote of a majority of the directors. Assuming arguendo, that the board of directors of Aranca US consists of five members as alleged by plaintiff, a majority vote of the five directors comprising the board is required to exercise the board's power. Such a majority is lacking.

As to plaintiff's claim that Aranca Mumbai, as the sole shareholder of Aranca US, has also ratified this action, under New York law, a shareholder lacks standing to pursue a direct cause of action to redress wrongs suffered by the corporation; rather such claims must be asserted derivatively, for the benefit of the corporation (*Abrams v Donati*, 66 NY2d 951, 953 [1985], *rearg denied* 67 NY2d 758 [1986]).

The court finds that plaintiff does not have legal capacity to sue, as plaintiff has failed to prove that this lawsuit was authorized by the board of directors. Accordingly, the complaint must be dismissed in its entirety. Having found that the complaint must be dismissed on the ground that plaintiff does not have legal capacity to sue, the court need not address the other issues raised in defendants' motion papers.

It is adjudged and declared that plaintiff lacks the capacity to bring this action. In all other respects the complaint is dismissed.

Settle Judgment.

DATED:      JUL 01 2007

  
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J.S.C.

**HON. LELAND DeGRASSE**  
**HON. LELAND DeGRASSE**