Beebout v Dolan
2007 NY Slip Op 34051(U)
December 11, 2007
Supreme Court, New York County
Docket Number: 0602579/2007
Judge: Herman Cahn
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 12/13/2007

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

PART 49

Index Number : 602579/2007

BEEBOUT, DONALD

vs.

DOLAN, PETER R.

SEQUENCE NUMBER : 002

DISMISS COMPLAINT

INDEX NO. ____________

MOTION DATE ____________

MOTION SEQ. NO. ____________

MOTION CAL. NO. ____________

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	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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

FILED
DEC 13 2007
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 12/11/07

HERMAN CAHN

HERMAN CAHN, 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: PART 49
---X
DONALD BEEBOUT, Derivatively on Behalf of
Nominal Defendant
BRISTOL-MYERS SQUIBB COMPANY,

Plaintiff,

-against-

INDEX NO. 602579/07

PETER R. DOLAN, ANDREW BODNAR,
JAMES M. CORNELIUS, JAMES D.
ROBINSON III, LEWIS B. CAMPBELL,
LOUIS J. FREEH, LAURIE H. GLIMCHER
and LIEF JOHANSSON,

Defendants,

- and -

BRISTOL-MYERS SQUIBB COMPANY,

Nominal Defendant.
---X

FILED
DEC 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

HERMAN CAHN, J:

Plaintiff, David Beebout, a shareholder of nominal defendant Bristol-Myers Squibb Company ("Bristol-Myers"), brings this shareholder derivative action against several members of Bristol-Myers Board of Directors ("Moving Defendants")[1], certain former Bristol-Myers executive officers[2] and nominal defendant Bristol-Myers, for damages resulting from the alleged breach of their fiduciary duties. The director defendants and nominal defendant Bristol-Myers

[1] The Director Defendants are James M. Cornelius ("Cornelius"), James D. Robinson III ("Robinson"), Lewis B. Campbell ("Campbell"), Louis J. Freeh ("Freeh"), Laurie H. Glimcher ("Glimcher") and Leif Johansson ("Johansson").

[2] Peter R. Dolan ("Dolan"), was Bristol-Myers chief executive officer until his termination on September 12, 2006. Andrew Bodnar ("Bodnar") was a senior vice president until his termination in September, 2006.

move to dismiss the amended complaint on the ground that plaintiff failed to make a pre-suit demand on Bristol-Myers Board of directors, or sufficiently plead demand futility through particularized allegations in the complaint.[3]

Bristol-Myers is incorporated in Delaware. Its business is development, manufacture, distribution and sale of pharmaceuticals and other health related products. At the time this action was commenced, Bristol Myers's Board of Directors consisted of nine directors.

The complaint alleges that defendants Cornelius, Robinson, Campbell, Freeh, Glimcher and Johansson were members of both the Board and its Audit Committee and, as Audit Committee members, they met periodically with Bristol Myers's Chief Compliance Officer and General Counsel to discuss legal matters that might have a material impact on the company's financial statements and/or policies and procedures. (9/12/07 Reisner Aff, Ex. B, hereinafter "Complaint", para. 18)

Plavix, a drug that is said to prevent heart attacks and strokes, has been Bristol-Myers top selling product for the past three years. In November, 2001, Apotex, a Canadian pharmaceutical company, filed an application with the United States Food and Drug Administration ("FDA") seeking approval to manufacture and sell a generic form of Plavix. Upon learning of Apotex's plans, Bristol-Myers filed a patent infringement lawsuit against Apotex.[4] Apotex counterclaimed alleging that Bristol-Myers's patent was invalid.

---

[3] Although the moving defendants submitted their motion to dismiss before plaintiff amended the complaint, they now request that the court apply the motion to dismiss to the amended complaint. (*Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 38 [1st Dept 1998]). That request is granted.

[4] Bristol-Myers patent on Plavix runs until 2011.

[* 4]

In March, 2006, Bristol-Myers and Apotex entered into a settlement agreement to resolve the litigation. However, in accordance with a pre-existing consent order with the Federal Trade Commission ("FTC"), the settlement agreement was subject to FTC review and approval. The FTC refused to approve the settlement, inter alia, on the ground that the agreement was anti-competitive because Bristol-Myers had agreed not to market a generic version of Plavix during Apotex's exclusive license period.

The complaint alleges that in May, 2006, Bodnar, "on behalf of Bristol-Myers and with the knowledge and approval of the Board," met with Apotex to renegotiate the settlement agreement and that, during the course of that meeting, Bodnar, "at the direction of and with the knowledge and approval of the Board" made an oral representation to Apotex that if the parties reached a revised agreement, Bristol-Myers would not launch a generic version of Plavix. (Complaint, para. 31, 32) On May 25, 2006, "with the knowledge and approval of the Board," Apotex and Bristol-Myers formally executed a revised settlement agreement that was then submitted to the FTC for review. The revised agreement did not disclose that Bodnar, on behalf of Bristol-Myers, orally represented to Apotex that Bristol-Myers would not launch a generic version of Plavix. However, Apotex, in a letter submission to the FTC, did disclose Bodnar's oral representation. When the FTC received the Apotex letter, it requested that Bristol-Myers submit a certification that Bristol-Myers, "ha[d] not made any representation, commitment or promise to Apotex, whether oral or written, that is not explicitly set forth in the Revised [] Agreement, including the representation that [Bristol-Myers] would not launch an authorized generic version of Plavix during Apotex's period of exclusivity." (Complaint, para. 37). The complaint claims that the Board received and reviewed the FTC's request, and that, in June, 2006

Bodnar, "at the direction of and with the knowledge and approval of the Board," signed the certification and submitted it to the FTC. (*Id.*) In June, 2006, Bristol-Myers disclosed that state attorneys general had raised concerns regarding the terms of the revised settlement and on July 27, 2006 Bristol-Myers learned that the Antitrust Division of the Department of Justice was conducting a criminal investigation regarding the proposed settlement of the Plavix litigation. (Complaint, para. 40) On July 28, 2006, Bristol-Myers was notified that the revised settlement had not received clearance form the state attorneys general. (Complaint, para. 42)

On September 12, 2006, Bristol-Myers announced that both CEO Dolan and the company's general counsel would be leaving their positions immediately. The public announcement explained that it had "received reports from the company's outside counsel on issues relating to the Plavix patent litigation that were "prepared and delivered at the request of the Board as part of its ongoing assessment of this matter." (Complaint, para 46) The announcement further explained that during its deliberations, the Board also heard from a former Federal Judge, who had conducted his own inquiry, and recommended that Dolan and the general counsel be terminated. (*Id.*)

Following the denial of regulatory approval of the settlement agreement, Apotex launched its generic product. Bristol-Myers obtained a preliminary injunction that prohibited Apotex from selling the generic drug and, at a subsequent trial, Bristol-Myers prevailed on its patent infringement claim.

In May, 2007, Bristol-Myers announced that it had reached an agreement with the Antitrust Division to resolve the criminal charges by pleading guilty to two counts relating to false statements to a government agency and paying a one million dollar fine.

The complaint claims that throughout the period that the settlement agreement and the company were under scrutiny by the state attorneys general and the Antitrust Division, the price of Bristol Myers's shares declined significantly. As a result, the complaint demands damages in favor of the company for the amount of damages sustained by Bristol-Myers as a result of defendants' alleged misconduct.

In the complaint, plaintiff states that he has not made a pre-litigation demand on the board because the demand would be a futile and useless act in that: (1) the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action and (2) because their actions were illegal and could not have been an exercise of good faith business judgment.

Discussion:

The demand requirements for a derivative suit are determined by the law of the state in which the company is incorporated. Because Bristol-Myers is a Delaware corporation, Delaware law applies. (*See e.g., Hart v. General Motors Corp.*, 129 A.D.2d 179, 183 [1st Dept. 1987] citing *Diamond v. Oreamuno*, 24 N,Y,2d 494, 503 [1969])

The moving defendants contend that under the test articulated in *Rales v. Blasband*, 634 A.2d 927, 934 [Del. 1993], *abrogated on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (discussed infra), the complaint must be dismissed because, plaintiff has failed to plead particularized allegations creating a reasonable doubt that a majority of the directors could respond to a demand with independence and disinterest. Moreover, the moving defendants claim that even if the court finds that the test articulated in *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984) (discussed infra) applies to this action, the plaintiff has failed to plead sufficient

particularized allegations to create a reasonable doubt that the directors actions were a good faith exercise of their business judgment.

In opposition, plaintiff contends that the pre-litigation demand on the Board is excused because the well pleaded facts in the complaint create a reasonable doubt that the directors are independent and disinterested and/or that the challenged transaction was otherwise the product of a valid exercise of business judgment.

The issue to be considered on this motion is whether the allegations of the complaint support plaintiff's assertion that a pre-suit demand on the Board would be futile. Under Delaware Chancery Court Rule 23.1, a plaintiff in a derivative suit must seek remedial action from the corporation's Board of Directors. (*Levine v. Smith*, 591 A.2d 194, 200 [Del 1991]) The Delaware "requirement of a demand upon the directors of a corporation to pursue a derivative complaint is a recognition of the inherent powers of the board to manage the affairs of the corporation, which includes making decisions about whether or not to pursue litigation. (*Wilson v. Tully*, 243 A.D.2d 229, 232 [1st Dept 1998]) Because shareholder plaintiffs "must overcome the powerful presumptions of the business judgment rule before they will be permitted to pursue a derivative claim", Delaware law requires that the shareholder plaintiff either make a demand on the Board or plead particularized factual allegations that the demand would be futile. (*Simon v. Becherer*, 7 A.D.3d 66, 71-72 [1st Dept 2004]) Courts have repeatedly emphasized that "conclusory allegations are not considered as expressly pleaded facts or factual inferences." (*Brehm v. Eisner*, 746 A.2d at 255; *David Shaev Profit Sharing Account v. Cayne*, 24 A.D.3d 154 [1st Dept 2005]["conclusory allegations, unsupported by allegations of specific fact" cannot satisfy demand futility requirements]; *Wilson v. Tully*, 243 A.D.2d at 234 ["While the court will

accept well-pleaded facts as true, it will not take as true conclusory allegations of fact or law not supported by allegations of specific fact"])

Delaware courts have articulated two standards for determining when the demand may be excused as futile. In the first instance, where the Board's actions are at issue, demand will not be excused unless plaintiff alleges, with particularity, facts creating a reasonable doubt that (1) the directors are disinterested or independent or (2) that the transaction at issue resulted from a valid exercise of business judgment. (*Aronson v. Lewis*, 473 A.2d 805, 814 [Del. 1984]) On the other hand, where the wrong alleged is the Board's inaction or failure to monitor or supervise, a court need only determine whether the complaint meets the first prong of the *Aronson* test regarding independence and disinteredness. (*Rales v. Blasband*, 634 A.2d at 934). Here, the *Aronson* test applies because plaintiff challenges the Board's alleged decisions to approve the settlement agreements; the Board's alleged direction to Bodnar to make the oral representation to Apotex and its alleged approval of the certification to the FTC that stated that Bristol Myers had not made any oral representations to Apotex.

A. Disinterest and Independence

Under Delaware law,

> A director is interested if he will be materially affected, either to his benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders. The 'mere threat' of personal liability in the derivative action does not render a director interested; however, a 'substantial likelihood' of personal liability prevents a director from impartially considering a demand.

[* 9]

(*Seminaris Landa*, 662 A.2d 1350, 1354 [Del. Ch. 1995][citing *Rales v. Blasbandi*, 634 A.2d at 936]; *Grimes v. Donald*, 673 A. 2d 1207, 1216 n. 8 [Del 1996][demand on the Board is not deemed futile merely because the directors are named as defendants])

In this case, plaintiff claims that the moving defendants are incapable of independently and disinterestedly considering the demand, because, as members of the Board during the relevant period, they were knowing participants in a criminal conspiracy that resulted in the company's guilty plea and criminal fine. (Complaint, para 60)

However, plaintiff has failed to offer particularized facts to support this conclusion. Instead, plaintiff relies on conclusory allegations that Dolan engaged in misconduct "at the direction of and with the knowledge and approval of the Board." These allegations are insufficient to excuse a demand on the ground of disinterestedness and independence. (*Simon v. Becherer*, 7 S.D.3d at 71-73; *see also*, *Ratner v. Bidzos*, 2003 Del. Ch. LEXIS 103 at *34 & n.53 (Del. Ch. Sept. 30, 2003) [rejecting demand futility claim where complaint contained only conclusory allegations that the directors knew of and participated in the misconduct]; *In re Forest Laboratories, Inc. Derivative Lit.*, 450 F. Supp. 2d 379 [S.D.N.Y. 2006] [rejecting demand futility claim where the complaint contained only conclusory statements that directors authorized and permitted the wrongdoing])

In *Wilson v. Tully*, 243 A.D.2d at 235, the plaintiff alleged that the Merrill Lynch directors were aware of a history of inappropriate investments but, because municipal financing activities were an important part of the company's business, the directors "made a conscious decision to authorize or permit" allegedly unlawful securities sales to Orange County, CUSTOMER AGREEMENT. There, the court held that demand futility was not established

because plaintiff's conclusory allegations were not supported by particularized facts and that plaintiff failed to "point to any specific conduct of the individual directors" to support the assertions. Accordingly, the court in *Wilson* dismissed the derivative complaint.

Similarly, in *Simon v. Bechereri*, 7 A.D.3d at 68-71, plaintiff complained that J.P. Morgan/Chase directors, by virtue of their oversight roles as members of the risk oversight and audit committees, breached their fiduciary duties by "acquiescing in, approving and/or directing decisions" to have the company participate in allegedly fraudulent transactions with Enron. In that case the court concluded that, in the absence of specific facts demonstrating that the Board members profited from the challenged transactions or personally approved any misconduct, the complaint "fail[ed] to allege, in requisite detail, the substantial likelihood of the directors' liability, and therefore was dismissed.

Moreover, it is settled law that in the context of "futility of demand" in a derivative action, the court will not accept as true the conclusory allegations in the complaint that are not supported by allegations of specific facts. (*See, Wilson v. Tully*, 243 A.D.3d at 234; *David Shaev Profit Sharing Account v. Cayne*, 24 A.D.3d at 154.)

Thus, the complaint fails to satisfy the first prong of the *Aronson* test as it does not allege, with particularity, facts that create a reasonable doubt that the moving directors were disinterested or independent.[5]

---

[5] If the first prong of the *Aronson* test is not satisfied, the court may consider whether demand is excused because there is reasonable doubt that the complained of action was the product of valid business judgment. (*Aronson v. Lewis*, 473 A.2d at 814)

B. Business Judgment

The second prong of the *Aronson* analysis "focuses on the substantive nature of the challenged transaction and the Board's approval thereof." (*Pogostin v. Rice*, 480 A.2d 619, 624 [Del. 1984].) For the demand to be excused:

> Plaintiffs must allege particularized facts that raise doubt about whether the challenged transaction is entitled to the protection of the business judgment rule. Plaintiffs may rebut the presumption that the board's decision is entitled to deference by raising a reason to doubt whether the board's action was taken on an informed basis or whether the directors honestly and in good faith believed that the action was in the best interest of the corporation. Thus, plaintiffs must plead particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision.

Here, again, plaintiff has failed to allege sufficient particularized facts to support the allegations that the actions that were the subject of the Anti Trust Division's investigation were undertaken with the specific knowledge and consent of the Director Defendants, the movants herein. (Complaint para 61) Simply repeating the mantra that the actions were "at the direction of and with the knowledge and approval of the Board" is not sufficient. Some details should be pleaded, i.e. was their approval at a board meeting? Were all the movants present? Do the minutes contain a accurate report of the discussions relating to this matter? Who made the presentation to the Board, on which the Board wrongfully approved the illegal action, etc. Moreover, he has failed to plead specific facts demonstrating that a majority of the directors were involved in the decision to approve the unlawful conduct. (*See, Wilson v. Tully*, 243 A.D.2d at 229 [demand not futile despite conclusory allegation that directors permitted an illegal course of conduct absent particularized allegations of specific conduct by the directors]; *Andreae v Andreae*, 1992 WL 43924 at *4 [Del. Ch. March 5, 1992][dismissing complaint based on conclusory allegation that the Board approved illegal conduct.

Accordingly, plaintiff has not established the futility of the demand as required by Delaware Chancery Court Rule 23.1.

The Court notes that the dismissal of the complaint is only as to the director defendants. It is not dismissed as to defendants Dolan and Bodnar, although an additional amended complaint should be served.

ORDERED that the motion is granted.

This decision constitutes the order of the court.

DATE: December 11, 2007

J.S.C.

FILED
DEC 13 2007
NEW YORK
COUNTY CLERK'S OFFICE