

Lee v Hollander

2008 NY Slip Op 31333(U)

May 8, 2008

Supreme Court, Queens County

Docket Number: 0018645/2007

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA PART 2
Justice

	x	
KIMBERLY LEE, THOMAS ORFANOS, PAUL RICHARDS, ARTHUR STEIN, MARILYN UTSTEIN, and PETER ZAPHIRIS, SHAREHOLDERS OF TRANSTECH SERVICE NETWORK, INC., SUING INDIVIDUALLY AND IN THE RIGHT OF TRANSTECH SERVICE NETWORK, INC., and NEIL WACKERMANN and ROGER JENSEN,		Index Number <u>18645</u> 2007 Motion Date <u>February 13,</u> 2008 Motion Cal. Number <u>16</u> Motion Seq. No. <u>1</u>
Plaintiffs,		

- against -

DAVID S. HOLLANDER, KAREN HOLLANDER, TRANSTECH SERVICE NETWORK, INC., SNAP' PALLET LLC, and "JOHN DOE #1" through "JOHN DOE #25", the last twenty -five names being fictitious and unknown to Plaintiffs, the persons intended being the Persons, if any, involved in the acts or omissions described in the Complaint,

Defendants.

x

The following papers numbered 1 to 14 read on this motion by defendants for an order dismissing the complaint pursuant to CPLR 3211(a)(7). Plaintiffs' cross-move for an order (1) lifting the stay of disclosure pending defendants' motion, pursuant to CPLR 3104(a) and 3214(b); (2) deeming all objections to plaintiffs' first request for the production of documents and first set of interrogatories waived, except those properly based on privilege, pursuant to CPLR 3104(a), 3122 and 3133, and 12 NYCRR §130-1.1-a(a)-(b); (3) awarding sanctions in the amount of \$10,000.00 for filing a frivolous motion to dismiss, pursuant to 12 NYCRR § 130-1.1-a(a)-(b); and (4) awarding sanctions in the amount of \$2,500.00 for the failure to appear at a preliminary

conference on January 28, 2008, pursuant to
12 NYCRR § 130-1.1-a(a)-(b).

	<u>Papers Numbered</u>
Notice of Motion- Affirmation-Affidavits	
Exhibits (1-3).....	1-7
Notice of Cross Motion-Affidavit-Exhibits (A-E)..	8-12
Reply Affirmation-Exhibits (A-C).....	13-14
Memorandum of Law.....	
Memorandum of Law.....	
Memorandum of Law.....	

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 590-591 [2005]; Leon v Martinez, 84 NY2d 83, 87 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). However, bare legal conclusions are not presumed to be true and are not accorded every favorable inference (see NCJ Cleaners, LLC v ALM Media, Inc., 48 AD3d 766 [2008]; Morris v Morris, 306 AD2d 449, 451 [2003]; Doria v Masucci, 230 AD2d 764, 765 [1996]).

For a wrong against a corporation, a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation (Citibank v Plapinger, 66 NY2d 90, 93 [1985]; Abrams v Donati, 66 NY2d 951, 954 [1985]). Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged (see General Rubber Co. v Benedict, 215 NY 18 [1915]; Hammer v Werner, 239 App Div 38 [1933]). But allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually (see e.g. Niles v New York Cent. & Hudson Riv. R. Co., 176 NY 119 [1903]; Carpenter v Sisti, 45 AD2d 529, 531 [1974]). A complaint in which the allegations confuse a shareholder's derivative and individual rights will, therefore, be dismissed (Abrams v Donati, 66 NY2d 951, 954 [1985]; Greenfield v

Denner, 6 NY2d 867 [1959]), though leave to replead may be granted in an appropriate case.

Plaintiffs Kimberly Lee, Thomas Orfanos, Paul Richards, Arthur Stein, Marilyn Utstein, and Peter Zaphiris are all minority shareholders in Transtech Service Network, Inc. (Transtech). Plaintiffs Neil A. Wackermann, Roger L. Jensen and Paul Richards each acquired an interest in a Debt Exchange Agreement involving Transtech. In addition, some of the plaintiffs are alleged to have lent sums to either David S. Hollander or Transtech. Defendant David S. Hollander is a majority shareholder and an officer of Transtech. Defendant Karen Hollander is the wife of David S. Hollander and is alleged to have provided sums from another corporation which were transferred to Transtech and used to pay Transtech's rent. Defendant Snap'Pallet LLC is a new company formed by David S. Hollander and is alleged to have been the recipient of Transtech's intellectual property.

A review of the complaint reveals that plaintiffs in their first four causes of action have alleged derivative claims on behalf of Transtech against defendant David S. Hollander for breach of his fiduciary duties of loyalty and care, conversion of corporate assets and business opportunities, and fraud. It is also alleged that defendant Karen Hollander aided and abetted and conspired with David S. Hollander to breach his fiduciary duties, convert corporate assets and business opportunities and commit fraud. In each of these derivative claims, plaintiffs are required to set forth in the complaint--with particularity--an attempt to "secure the initiation of such action by the board or the reasons for not making such effort" (Business Corporation Law § 626[c]). To justify a failure to make a demand, it is not sufficient to name one director as a defendant with conclusory allegations of control over the other directors, as the plaintiffs have done here (Glatzer v Grossman, 47 AD3d 676 [2008]; Marx v Akers, 88 NY2d 189, 199-200, [1996]; Danzy v NIA Abstract Corp., 40 AD3d 804 [2007]; cf. Bansbach v Zinn, 1 NY3d 1, 11 [2003]). However, the affidavits of the other two directors make it clear that Mr. Reznick would recuse himself if presented with a demand, and that Mr. Abernathy would not pursue the claims against Mr. Hollander on behalf of Transtech. Under these circumstances, it would be futile to require plaintiffs to serve such a demand upon the corporation (see Bansbach v Zinn, *supra*; Marx v Akers, *supra*).

The court finds that plaintiffs have not improperly mixed their derivative and personal claims. Plaintiffs, in their individual capacities separately allege in the fifth, sixth, seventh causes of action claims for securities fraud, and fraudulent inducement. The eighth cause of action for fraud is

brought solely by Richards, and the ninth cause of action for breach of contract is brought by Richards, Stein and Zaphiris. However, to the extent that plaintiffs in their ad damnum clauses to the first four causes of action seek relief on behalf of the corporation, as well as on their own behalf, they are required to amend the ad damnum clauses to reflect solely the derivative claims.

In view of the foregoing, defendants' motion to dismiss the complaint is denied. Plaintiffs are directed to amend their ad damnum clauses so as to properly reflect their derivative claims. Karen Hollander's request for summary judgment dismissing the complaint against her is denied, as she failed to include such a request in the notice of motion, has not moved pursuant to CPLR 3212, and has not established that such relief is warranted at this time. Plaintiffs' cross motion is denied in its entirety.

Dated: 5/8/08

J.S.C.