

Comverse Tech., Inc. v Alexander

2008 NY Slip Op 33175(U)

October 27, 2008

Supreme Court, New York County

Docket Number: 600142/08

Judge: Charles E. Ramos

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

PRESENT: CC Ramos

PART 53

Index Number : 600142/2008
COMVERSE TECHNOLOGY, INC.
VS.
JACOB ("KOBI")
SEQUENCE NUMBER : 005
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION.

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Dated: 10/27/08

Charles E. Ramos
CHARLES E. RAMOS c.

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

-----X
COMVERSE TECHNOLOGY, INC.,

Plaintiffs,

Index No. 600142/08

-against-

JACOB ("KOBI") ALEXANDER, and
WILLIAM SORIN,

Defendants.
-----X

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Charles Edward Ramos, J.S.C.:

The defendant William Sorin ("Sorin") moves to dismiss the third cause of action for unjust enrichment in the complaint pursuant to CPLR 3211(a)(1), (5), and (7).

This action arises out of an option backdating scheme that took place over ten years. During this period, the defendants were employees of the plaintiff Comverse Technology, Inc.

("Comverse"). Jacob Alexander ("Alexander") held positions as CEO and Chair of the Board of Directors and Sorin held positions as a director, the corporate secretary, and General Counsel.

As alleged in the complaint, from 1991 to 2001, Comverse granted stock options to its employees through at least eight different stock option plans. Comverse's Compensation Committee (the "Committee") had exclusive authority to interpret and administer the plans, and approve the grantees and the terms of the stock options. The Committee was able to grant stock options even without a formal meeting if all of its members consented in writing through the use of "unanimous written consent" forms ("UWC").

One type of stock option that Comverse granted to its employees were known as "incentive options." Under Comverse's stock option plan the exercise price of the incentive options were not to be lower than the fair market value of a share, as determined by the closing sale price of Comverse's common stock on the grant date.

In 1991, certain Comverse executives, including the defendants, began backdating options. Alexander directed and controlled the option grant process and the backdating scheme. Sorin aided and assisted Alexander, by drafting grant documents with false grant dates and deceiving the Committee in order to obtain its approval. The Committee was given inaccurate information with respect to the actual grant date and often the actual identities of the grantees.

The scheme was accomplished in two parts. In the first part, Alexander would review Comverse's historical stock prices and find a date where the stock was trading at a relative low level. This date would then be used as the grant date, thereby backdating the option. This date was also used to measure the vesting period for the options, which was generally four years from the date of the grant. Consequently, backdating the option accelerated its vesting period as well.

In the second part, Sorin or someone acting under Sorin's direction, would send the Committee UWCs containing "as of" dates. The "as of" dates falsely indicated that the options were approved as of that date. Each UWC was accompanied by a list of

the grantees and the amount of options to be granted. The Committee signed and returned the UWCs based on Sorin's misrepresentations that sufficient corporate action had taken place on those dates approving the options.

From 1991 to 2001, Alexander received at least 8,625,000 options and Sorin received at least 434,500 options. All the options were backdated and were granted with prices lower than the fair market value. The difference between the fair market value price on grant date and the backdated price for exercised options amounted to \$6,435,750 for Alexander and \$1,010,424 for Sorin.

In September 1999, Alexander and Sorin, with the assistance of other Comverse employees, expanded the scheme by creating a hidden account where options for fictitious employees, also created by Alexander, were deposited. The options were then distributed by Alexander to various individuals for various reasons. These particular distributions were not approved by the Committee. The hidden account was closed on April 29, 2002.

Comverse also alleges that Alexander and Sorin also deliberately misled the outside auditors of Comverse by failing to disclose the fact that the options were backdated, signing false management representation letters, and made numerous misrepresentations to the outside auditors pertaining to the option approvals and grants.

In May 2002, Comverse initiated a Stock Option Exchange Program ("SEOP") because its stock price had fallen sharply.

This gave employees an opportunity to exchange their unexercised options for repriced options. Both Alexander and Sorin exchanged substantial options, but failed to disclose that their options were backdated.

On January 16, 2008, Comverse commenced this action seeking damages for fraud, breach of fiduciary duty and unjust enrichment. Sorin moves to dismiss the unjust enrichment claim on the ground that it is barred by the statute of limitations.

Sorin argues that the unjust enrichment claim should be dismissed because the last instance of alleged backdating occurred in October 2001. Unjust enrichment claims are governed by a six year statute of limitations pursuant to CPLR 213(1). Therefore, Comverse commenced this action after the statute of limitations expired in October 2007.

It is unclear from the pleadings when Comverse actually discovered the existence of the backdating scheme. The scheme may have remained hidden until as late as March 2006.

Comverse contends that Sorin is estopped from asserting a defense based on the statute of limitations because his conduct delayed the commencement of this action. Comverse also asserts that it reasonably relied on misrepresentations made by Sorin to the Committee and to the outside auditors, that further concealed Alexander and Sorin's fraudulent scheme.

Equitable estoppel applies where it is the defendant's affirmative misconduct that produces a long delay between the accrual of the cause of action and commencement of the legal

[* 6]

proceeding (*Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 553 [2006]). Where concealment without actual misrepresentation is alleged to have prevented timely commencement of the action, a fiduciary relationship must exist between the parties, that gives the defendant an obligation to inform the plaintiff of the facts underlying the cause of action. (*Zumpano v Quinn*, 6 NY3d 666, 676 [2006]).

Courts may deny application of the equitable estoppel doctrine in situations where the misconduct ceased before the expiration of the statute of limitations. The reason being that even though the plaintiff was lulled justifiably into inactivity, that period ended and there was sufficient time thereafter to commence the action (*Simcuski v Saeli*, 44 NY2d 442, 450 [1978]).

If the misconduct continued past the expiration of the statute of limitations, then "[t]he burden is on the plaintiff to establish that the action was brought within a reasonable time after the facts giving rise to the estoppel have ceased to be operational" (*id.*). In the application for equitable estoppel, it is fundamental that the plaintiff establish the subsequent and specific actions that prevented the timely commencement of the action (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]).

Here is undisputed that Sorin, as a director, the corporate secretary, and General Counsel of Comverse owed fiduciary obligations to Comverse. Sorin's last act of misconduct occurred in October 2001. The statute of limitations for unjust enrichment is six years, therefore, the statute of limitations

expired in October 2007. This action was commenced in January 2008.

On "a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 20 [2005]).

The Court finds Comverse sufficiently alleges the subsequent and specific misconduct that prevented timely commencement of the action. Comverse alleges that Sorin concealed the scheme by making misrepresentations and providing false documentation to the Committee and to the outside auditors. It is alleged that Sorin's misconduct prevented discovery of the scheme until March 2006, when an internal investigation into Comverse's option granting practices began.

Arguably, the statute of limitations should run from May 2002, when Sorin exchanged his backdated options in the SEOP. Sorin's failure to disclose that his options were backdated is another incident of misconduct that further extends the statute of limitations.

"The principle that a wrongdoer should not be able to take refuge behind the shield of his own wrong is a truism" (*General Stencils, Inc. v Chiappa*, 18 NY2d 125, 127 [1966]). Accepting the allegations as true, there can be no question that it was Sorin's misconduct that was a direct cause of the long delay in the commencement of this action. Therefore, Sorin is estopped

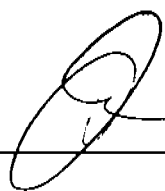
from asserting the statute of limitations defense. At this early pleading stage, this Court will afford Comverse a liberal interpretation of the complaint in light of the gravity of misconduct and the extensive deception on the part of Sorin.

Accordingly it is,

ORDERED that the defendant William Sorin's motion to dismiss the third cause of action in the complaint is denied in its entirety; and it is further

ORDERED that the defendant William Sorin is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: October 27, 2008



J.S.C.

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HON. CHARLES E. RAMOS