SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Calendar Nos. 936-016
1339-017

STEPHEN RAVNIKAR,
Plaintiff,

Index No. 11961/03

HON. JOSEPH J. MALTESE

-against-

DECISION & ORDER

SKYLINE CREDIT-RIDE, INC.,
Defendant.

The following papers numbered 1 to 5 were marked fully submitted on the 24th day of April, 2009:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant Skyline Credit-Ride, Inc., with Supporting Papers and Memorandum of Law (dated March 18, 2009)	1
Notice of Cross Motion for Summary Judgment by Plaintiff Stephen Ravnikar, with Supporting Papers (dated April 13, 2009)	2
Reply Affidavit by Defendant Skyline Credit-Ride, Inc., (dated May 7, 2009)	3
Reply Affirmation by Defendant Skyline Credit-Ride, Inc., and Memorandum of Law (dated May 8, 2009)	4
Reply Affidavit by Plaintiff (dated May 12, 2009)	5

Upon the foregoing papers, the motion (No. 936) for summary judgment of defendant Skyline Credit-Ride, Inc. and the cross motion (1339) of plaintiff Stephen Ravnikar for like relief are denied.

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By way of background, in a Decision and Order dated February 26, 2004, Supreme Court Justice Martin Solomon granted a cross motion for summary judgment of defendant Skyline Credit-Ride, Inc. (hereinafter "Skyline") dismissing plaintiff's first, second, fourth, fifth, sixth, seventh, eighth and ninth causes of action in the complaint pursuant to CPLR 3211 (a)(7) and CPLR 3212. As a result, the only remaining cause of action is plaintiff's third wherein compensatory and punitive damages are sought from Skyline as a result of its alleged retaliation against plaintiff, Stephen Ravnikar, by limiting his ability to receive radio-dispatched pick-up calls for his livery operations.

It is undisputed that Ravnikar is a shareholder of the defendant corporation, Skyline, which operates a livery dispatch service that is regulated by the New York City Taxi and Limousine Commission. As a shareholder, plaintiff owns certain "radio rights", i.e., the right to receive calls for service from Skyline's central dispatch service.[1] At the time this action was commenced in June 2003, plaintiff owned the rights to ten radios and one car. In the complaint, he alleged that Skyline has implemented a "leasing program" which has been "manipulated by [its] officers and directors to favor corporate insiders and to economically punish small shareholders like [plaintiff]." More particularly, plaintiff alleges that despite the fact that his radios were on Skyline's "leasing lists" for seven years, new drivers enrolled in the leasing program were *never* assigned to drive cars using his radios in retaliation for his complaints to Skyline's Board of Directors (hereinafter the "Board"), which began in 1997.

[1] Each radio represents two shares of Skyline's stock. For the sake of clarity, each of skyline's shareholders has the option of purchasing either radio rights or the rights to both the radio and the car. If a shareholder owns the rights to the radio but not the car, Skyline leases that radio to the owner. However, if a shareholder owns the rights to both the car and its radio, both are leased to the driver rather than the "owner" of the vehicle.

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According to plaintiff, his oral and written complaints to the Board challenged, *inter alia,* (1) the impact of the Board's corporate governance on smaller shareholders, (2) the sale of certain radio frequencies to Nextel, (3) the mismanagement of Skyline's leasing program and dispatch equipment, and (4) discrimination against him personally as a "white American". Plaintiff also alleges that defendant's continuous pattern of retaliation and disparate treatment through its leasing procedures have deprived him of drivers for all of his radios, and thereby deprived him of his fair share of the revenues generated by the business, estimated at $407,902.00. Finally, plaintiff claims that he was forced to retain "outside" lease managers for his radios to mitigate his losses.

In support of its motion for summary judgment dismissing the remaining cause of action, Skyline maintains that there is insufficient evidence to establish (1) plaintiff's unequal treatment by the Board, (2) a causal connection between plaintiff's complaints and its alleged retaliatory actions, and/or (3) the loss of business revenue as a result thereof. With regard to the latter, it is alleged that the methods utilized by plaintiff's purported expert to calculate monetary damages are significantly flawed. As for the claims of disparate treatment, the affidavits of George Potter (President of Skyline) and Patricio Martinez (Membership Chairman of Skyline) are submitted to establish that defendant's policies and procedures were applied uniformly amongst all of its shareholders. Of particular note here is their purported explanation of Skyline's procedure for assigning new drivers to shareholders' radios. According to the above affiants, the normal reason why a radio might remain on the leasing list for a lengthy period of time is that most of the new drivers do not own cars. The radios can only be leased to those who do. Stated otherwise, "it is [allegedly] more difficult to find drivers for owners [like plaintiff] who own radios only." In any event, it is alleged that there is no legal basis for plaintiff's retaliation claim, since he is not engaged in any protected activity under state or federal law. In this regard, Skyline characterizes the issues that plaintiff has sought to redress as mere "personal

disagreements" with the Board and corporate management, which are protected by the business judgment rule. These are not matters of "public concern" and do they affect "protected speech". Finally, Skyline maintains that the plaintiff/shareholder must bring an article 78 proceeding to challenge the Board's alleged improprieties.

In cross-moving for summary judgment, plaintiff claims that 100% of his radios were without drivers, which is grossly disproportionate to the total number of the company's radios, which purportedly number 626. Under plaintiff's analysis of the leasing lists, "if [he] were treated as an equal shareholder, only 6.7% of [his] radios should [be] without drivers at any [given] time." Thus, plaintiff claims that Skyline is manipulating its leasing program by, e.g., failing to assign new drivers in accordance with its stated company policies and practices. To the contrary, plaintiff claims that none of the 2,000 new drivers in the program during the relevant time period were assigned to any of his radios. According to plaintiff, this "economic discrimination" is in retaliation for his complaints to the Membership Committee of the Board, and his maintenance of this lawsuit. In support, plaintiff submits the affidavit of James Orozco, a former member of the Board of Directors of Skyline, who served as its Communications Chairman in 2003. Mr. Orozco avers that Skyline discriminates against its "dissenting" shareholders such as plaintiff, and that it is common knowledge within the company that "corporate insiders and favorites... receive drivers and other benefits not available to either dissenting shareholders or holders of small [numbers] of defendant's shares." He further avers that Skyline unfairly allocates new drivers by assigning them to "inner circle radios...consisting of [those owned by members of] the Board of Directors and their friends", rather than randomly assigning radios to those on its leasing lists. Finally, plaintiff relies upon the "summary report" of his accounting expert dated November 10, 2008 to substantiate his loss of business income. Plaintiff's expert allegedly conducted a forensic evaluation of the activities of the defendant corporation and those of the plaintiff for the period January 1, 1998 through March 31,

2007, and estimated the loss of revenue incurred by plaintiff at $407, 902.00.

It is familiar law that the so-called business judgment rule bars judicial review of the actions of a Board of Directors. and is uniformly applied absent a showing of, e.g., bad faith, unlawful discrimination, self-dealing or other misconduct by members of the board (*see* Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 537-538; Hochman v 35 Park West Corp., 293 AD2d 650, 651). "Pursuant to this rule, the party seeking review of a governing board's action has the burden of demonstrating a breach of fiduciary duty, [with] evidence of unlawful discrimination, self-dealing, or other misconduct by board members" (Hochman v 35 Park West Corp., 293 AD2d at 651; *see* Kleinman v Point Seal Restoration Corp. , 267 AD2d 430).

Consonant with the foregoing, on the papers before this Court, questions of fact clearly exist regarding whether defendant's complained of actions were the product of a bona fide business decision, i.e., whether the Board acted independently or engaged in self-dealing or bad faith in, e.g., implementing its leasing program with regard to the plaintiff and other small shareholders (*see* Schwartz v Marien, 37 NY2d 487, 491-492; Allannic v Levin, 57 AD3d 443, 444; Aronson v Crane, 145 AD2d 455, 456). Notably, although the third cause of action is denominated as one for Skyline's alleged "retaliation" against plaintiff for "rais[ing such] issues of concern", the alleged misconduct, if proven at trial, would work to establish the Board's breach of its fiduciary duty to treat all stockholders fairly and evenly (*see* Schwartz v Marien, 37 NY2d at 491-492; Aronson v Crane, 145 AD2d at 456). In short, the conflicting evidence submitted in support of their respective cross motions precludes either party from establishing a prima facie right to judgment as a matter of law.

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Accordingly, it is hereby:

ORDERED, that the motion and the cross motion are denied in their entirety.

All parties shall appear for a status conference in DCM Part 3 on **August 13, 2009** at 9:30 a.m.

E N T E R,

Dated: July 23, 2009

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Joseph. J. Maltese
Justice of the Supreme Court