

People v Winston

2010 NY Slip Op 33580(U)

December 17, 2010

Sup Ct, Nassau County

Docket Number: 007180/10

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

THE PEOPLE OF THE STATE OF NEW YORK
By ANDREW M. CUOMO, Attorney General of
the State of New York,

Plaintiff,

-against-

DAVID I. WINSTON, MINDY G. WINSTON,
JOSHUA A. WINSTON, RACHAEL L.
WINSTON, REBECCA A. WINSTON,
COALITION FOR BREAST CANCER CURES,
INC., THE RESOURCE HUB, INC. d/b/a THE
RESOURCE CENTER, JOHN DOE NO. 1 a/k/a
"RICHARD GREEN" and JOHN DOE NO. 2
a/k/a "DR. JEFFREY A. KRAMPNER",

Defendants.

TRIAL/IAS, PART 2
NASSAU COUNTY

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MOTION DATE: Oct. 18, 2010
Motion Sequence #009, 013

The following papers read on this motion:

- Notice of Motion..... X
- Amended Cross-Motion..... X
- Affirmation/Affidavit in Opposition..... XXX
- Affidavit/Affirmation in Support..... XXXXXX
- Affirmation in Further Support..... X
- Memorandum of Law..... XXX

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Motion by the Attorney General for summary judgment against defendants Joshua Winston, Rachel Winston, and Rebecca Winston is **granted** in part and **denied** in part. Cross-motion by defendants Joshua Winston, Rachel Winston, and Rebecca Winston for summary judgment dismissing the complaint is **denied**.

This is an action by the Attorney General to restrain the fraudulent solicitation of charitable donations pursuant to § 175(2) of the Executive Law. Plaintiff alleges that the Winston defendants solicited money for defendants Coalition for Breast Cancer Cures, Inc. and The Resource Hub, Inc. on the representation that the money would be used for cancer research when in fact it was used for defendants' personal expenses. Defendants David and Mindy Winston are officers or directors of both corporations and the parents of the other defendants. Plaintiff alleges that David Winston took the leading role in the fraudulent scheme, but there was participation by all of the individual defendants.

In the first cause of action, plaintiff alleges that defendants engaged in a fraudulent scheme for obtaining money by false pretense in connection with charitable solicitations in violation of Executive Law § 172-d(2). In the second cause of action, plaintiff alleges that defendants engaged in repeated fraudulent acts in the conduct of business in violation of Executive Law § 63(12). In the third cause of action, plaintiff alleges that defendants engaged in a pattern of deceptive acts or practices in the conduct of a business in violation of General Business Law § 349. In the fourth cause of action, plaintiff alleges that defendants failed to apply funds solicited from the public in a manner substantially consistent with Coalition for Breast Cancer's purposes in violation of Executive Law § 175(2)(e)(i). In the eighth cause of action, plaintiff alleges that defendants violated the directors and officers' duties of good faith and diligence under Not-for-Profit Corporation Law § 717. In the ninth cause of action, plaintiff alleges that defendants illegally distributed Coalition for Breast Cancer's cash or property in violation of Not-for-Profit Corporation Law § 719(a)(1). In the tenth cause of action, plaintiff seeks to remove defendants as directors of Coalition for Breast Cancer for cause pursuant to Not-for-Profit Corporation Law § 706(d) and remove them as officers for cause pursuant to Not-for-Profit Corporation Law § 714(c).

By order dated September 14, 2010, the court granted plaintiff's motion for summary judgment as to defendants David and Mindy Winston. Plaintiff moves for summary judgment against defendants Joshua, Rachael, and Rebecca Winston with respect to the first, second, third, fourth, eighth, ninth, and tenth causes of action.

On a motion for summary judgment, it is the proponent's burden to make a prima

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Executive Law §63(12) is aimed at protecting consumers from deceptive and misleading practices and, therefore, broadly defines “fraud” to include any act which could be characterized as dishonest or misleading (*People v Concert Connection*, 211 AD2d 310, 320 [2d Dept 1995]). Proof of an intent to defraud is not essential (Id). Nor is proof of intent to defraud necessary under Executive Law § 172-d(2) or in an action under General Business Law § 349 brought by the Attorney General (*People v Wilco Energy Corp.*, 284 AD2d 469 [2d Dept 2001]). Since Executive Law § 175(2)(e)(i) refers alternatively to “repeated fraudulent or illegal activities,” the court construes it in a similar manner.

Not-for-Profit Corporation Law § 717 codifies the fiduciary duty of corporate officers and directors (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). In the case of a closely held not-for-profit corporation, this duty is actually owed to the public. The officer or director must exercise “that degree of diligence, care, and skill which ordinarily prudent [people] would exercise under similar circumstances in like positions.” Thus, § 717 establishes an objective standard which does not require intent or specific knowledge of corporate misconduct. Where an officer or director has breached his fiduciary duty and has acted contrary to the interest of the not-for profit, he may be removed for cause as an officer or director of the not-for-profit corporation (*Davidson v James*, 172 AD2d 323 [1st Dept 1991]).

However, Not-for-Profit Corporation Law § 719 requires that the director “vote for or concur in” the illegal corporate action for liability to attach. Thus, an officer or director who has no knowledge of the corporate misconduct will not be liable under this section.

Plaintiff submits an affidavit from Marion Horowitz who worked as a telephone solicitor for the Resource Center beginning in November 2006. Ms Horowitz states that she observed Joshua Winston and Rebecca Winston working at the office one summer, calling donors to confirm pledges and thanking them for their donations. Another telephone

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solicitor, Susan Sheehan, also signed an affidavit stating that Joshua Winston worked as a solicitor. Plaintiff submits documents showing that Rachael Winston was an authorized signatory on a Resource Center bank account and received a debit card for the account. The certificate of incorporation of Coalition for Breast Cancer lists Rebecca and Rachael Winston as directors. The Professional Fund Raiser Registration Statement which the Resource Hub filed with the Charities Bureau of the Department of Law is signed by Joshua Winston as president of the corporation.

The court concludes that plaintiff has established prima facie entitlement to judgment against Joshua, Rebecca, and Rachael Winston with respect to the first, second, third, fourth, eighth, and tenth causes of action. Since plaintiff submits no evidence that Joshua, Rachael, or Rebecca voted for or concurred in any of the illegal activity, plaintiff has failed to establish prima facie entitlement to judgment with respect to the ninth cause of action. The burden shifts to defendants to show a triable issue as to whether they engaged in deceptive and misleading conduct and whether they exercised diligence and prudence as officers or directors of the corporations.

In opposition to plaintiff's summary judgment motion, Joshua Winston submits an affidavit stating that his only solicitation was on behalf of the "Veterans of Foreign Wars Fund." Joshua Winston admits charging approximately \$8,000 to his Resource Hub debit card over a five year period. However, Joshua denies knowledge of misappropriation of charitable funds and claims that he believed his use of the debit card was part of his father's compensation. Joshua admits that David Winston listed him as the president of Resource Center and a 40 % stockholder when the corporation was formed in 2005.

The court concludes that Joshua Winston has raised a triable issue as to whether he engaged in deceptive and misleading conduct but has not raised a triable issue as to whether he breached his fiduciary duty to the Resource Hub. A reasonable officer or director of a not-for-profit corporation would not simply rely upon his parents to conduct the charity in a proper manner. Had defendants conducted even a minimal inquiry, they would have determined that the charitable donations were not being applied to the purposes of the corporations. Accordingly, plaintiff's motion for summary judgment as to defendant Joshua Winston is **granted** as to the fourth, eighth and tenth causes of action. Plaintiff's motion for summary judgment as to defendant Joshua Winston is **denied** as to the first, second, third, and ninth causes of action. Because defendant Joshua Winston has failed to establish prima facie entitlement to judgment as to any of the causes of action, his motion for summary judgment is **denied**.

Defendant Rachael Winston denies working for either of the corporations and denies knowledge of "fraudulent behavior." Rachael estimates that her use of the debit card was limited to \$5,000 over a similar period. Rachael admits that when Resource Hub was formed she was listed as a vice president, director, and 40 % stockholder.

The court concludes that Rachael Winston has raised a triable issue as to whether she engaged in deceptive and misleading conduct but has not raised a triable issue as to whether she breached her fiduciary duty to the Resource Hub. As noted, she should not simply have relied upon her parents to conduct the charity in a proper manner. Accordingly, plaintiff's motion for summary judgment as to defendant Rachael Winston is **granted** as to the fourth, eighth and tenth causes of action. Plaintiff's motion for summary judgment as to defendant Rachael Winston is **denied** as to the first, second, third, and ninth causes of action. Because defendant Rachael Winston has failed to establish prima facie entitlement to judgment as to any of the causes of action, her motion for summary judgment is **denied**.

Rebecca Winston has submitted an affidavit in which she admits stuffing envelopes and calling donors on behalf of Coalition for Breast Cancer during the summer of 2007. Nevertheless, Rebecca denies knowledge of any "fraudulent behavior." Rebecca had access to a debit card and charged approximately \$1,000 in purchases. Rebecca denies being an officer, director, or stockholder of The Resource Hub but does not deny being a Coalition for Breast Cancer director.

The court concludes that Rebecca Winston has failed to raise a triable issue as to whether she engaged in deceptive and misleading conduct and has failed to raise a triable issue as to whether she breached her fiduciary duty to Coalition for Breast Cancer. As with her siblings, she should simply have relied upon her parents to conduct the charity in a proper manner. Accordingly, plaintiff's motion for summary judgment as to defendant Rebecca Winston is **granted** as to the first, second, third, fourth, eighth and tenth causes of action. Plaintiff's motion for summary judgment as to defendant Rebecca Winston is **denied** as to the ninth cause of action. Because defendant Rebecca Winston has failed to establish prima facie entitlement to judgment as to any of the causes of action, her motion for summary judgment is **denied**.

So ordered.

Dated DEC 17 2010

ENTERED

Joseph A. Bucaria
J.S.C.

DEC 23 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE