

Jakob v Gershwin Partners, Inc.

2011 NY Slip Op 33873(U)

June 21, 2011

Sup Ct, New York County

Docket Number: 602343/2009

Judge: Barbara R. Kapnick

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

J.S.C.

Index Number : 602343/2009

JAKOB, URS

vs.

GERSHWIN PARTNERS, INC.

SEQUENCE NUMBER : 001

DISMISS ACTION

PART 39

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____


PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the annexed memorandum decision.

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

Dated: 6/21/11



J.S.C.

BARBARA R. KAPNICK

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: IA PART 39**

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URS JAKOB, individually and as a
shareholder of GERSHWIN PARTNERS, INC.,
suing on behalf of himself and all
other shareholders of GERSHWIN PARTNERS,
INC., similarly situated and in the
right of GERSHWIN PARTNERS, INC.,

Plaintiff,

-against-

DECISION/ORDER
Index No. 602343/09
Motion Seq. No. 001

GERSHWIN PARTNERS, INC., SUZANNE
TREMBLAY and PETER ECKERT,

Defendants.

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BARBARA R. KAPNICK, J.:

In this shareholders' derivative action, defendants Suzanne Tremblay ("Tremblay") and Peter Eckert ("Eckert") move for an order, pursuant to CPLR 3211 (a)(1) and (a)(7), dismissing the Complaint in its entirety. Plaintiff Urs Jakob ("Jakob") cross-moves for an order, i) enjoining defendants Tremblay and Eckert, directors of nominal defendant Gershwin Partners, Inc. ("Gershwin"), from expending Gershwin's funds to defend themselves in this action; or, in the alternative, ii) pursuant to Business Corporation Law ("BCL") 723 (c), requiring Tremblay and Eckert to secure a bond in favor of Gershwin, for the repayment of any expenses advanced to them by Gershwin, including attorneys' fees, in the event that they are ultimately found, as a result of this action, not to be entitled to indemnification.

Background

Gershwin owns and operates the Gershwin Hotel, located at 7 East 27th Street, New York, New York. According to the Complaint, between April 10, 1992 and April 10, 2007, plaintiff Jakob and his wife, defendant Tremblay, were the only members of the Board of Directors ("Board"), and ran the day-to-day operations of the hotel. Jakob further alleges that he is presently a 28.75% shareholder in Gershwin and a former member of the Board, and that he and Tremblay are in the midst of acrimonious divorce proceedings in Canada. Tremblay and Eckert are currently shareholders and also co-presidents and directors of Gershwin.

In 2006, defendant Eckert and shareholders Herman Pettegrove, Rudolf Schinz, Carole Shandler, and Hans and Irma Jakob (Jakob's parents) as trustees of the H&I Irrevocable Trust, (the "West Coast Shareholders"), commenced a shareholders' derivative action against Jakob and Tremblay in New York Supreme Court, entitled *Peter Eckert, et al. v Gershwin Partners, Inc., et al.*, Index No. 602363/06 (the "2006 Action"). According to Jakob, in the 2006 Action, the West Coast Shareholders claimed that he and Tremblay made unauthorized transfers, loans or disbursements of Gershwin's funds to themselves, and miscalculated new shareholder percentages following the redemption of 51 shares held by Jeffrey Wilder (the

"Wilder Shares"). Plaintiffs in the 2006 Action also sought to recover \$302,000.00 allegedly loaned by Gershwin to Jakob and Tremblay.

In this action, Jakob alleges that, without his knowledge or consent, a settlement of the 2006 Action was negotiated and later, at a February 19, 2008 special shareholders' meeting, approved. He claims that the terms of the settlement were unfair to him personally, wasted Gershwin's assets, and were unduly favorable to Tremblay. According to the Complaint, Tremblay was awarded a larger percentage of the Wilder Shares than she was entitled to, and a salary and benefits package totaling approximately \$250,000.00 for 2006 and 2007. Further, the settlement provided that Gershwin would reimburse Tremblay, Eckert and the West Coast Shareholders for legal fees, amounting to approximately \$170,000.00, incurred in the 2006 Action, a provision Jakob contends was improper.

Jakob alleges that, in connection with the 2006 Action, Eckert falsely advised the West Coast Shareholders that Jakob had not paid off \$302,000.00 in loans made to him by Gershwin and, as a result, Eckert and Tremblay had caused Gershwin to withhold Jakob's rightful share of distributions which were issued to the other shareholders. According to the Complaint, Eckert also falsely

advised the West Coast Shareholders that the funds were distributed among all shareholders, even though Jakob was not issued a percentage, and that while Tremblay had benefitted from Jakob's wrongdoing, she was not responsible for such wrongdoing, despite the fact that the Court in the 2006 Action had not ruled on the issue of Tremblay's alleged misconduct.

Although in 2008 the proposed settlement agreement was submitted to the 2006 Action Court for approval, the Court never actually approved it and the West Coast Shareholders decided not to pursue the Action. According to Jakob, Eckert and the West Coast Shareholders improperly withdrew the 2006 Action because they knew the proposed settlement would not be approved. Tremblay and Eckert, however, dispute this allegation and contend that the 2006 Action and proposed settlement were abandoned because Jakob himself refused to approve the proposed settlement terms.

At a meeting of the Board on April 10, 2007, during the pendency of the 2006 Action, the West Coast Shareholders, Eckert and Tremblay voted to remove Jakob from the Board and elected Tremblay and Eckert as co-directors.

Subsequently, at a special shareholders' meeting on February 19, 2008, Tremblay and Eckert were re-elected, and the Gershwin

shareholders voted to approve the reallocation of the Wilder Shares in accordance with the schedule provided, which Jakob alleges improperly put into effect the terms of the 2006 Action proposed settlement agreement without Court approval or Jakob's consent.

In the Complaint, Jakob asserts the following causes of action: 1) corporate accounting of Gershwin (first cause of action); 2) breach of fiduciary duty against Tremblay and Eckert (second cause of action); 3) waste of corporate assets against Tremblay and Eckert (third cause of action); 4) declaratory judgment declaring that Jakob was improperly removed from the Board of Directors (fourth cause of action);¹ and 5) conversion against all the defendants (fifth cause of action).

The Instant Motion

Tremblay and Eckert now move to dismiss plaintiff's derivative claims, on the ground that Jakob cannot fairly and adequately represent the interests of Gershwin's shareholders and, therefore, lacks standing to commence such an action on behalf of Gershwin. Defendants allege that Jakob is personally deeply and divisively at odds with Gershwin's other shareholders, including his parents and

¹ There was no opposition to defendants' motion to dismiss the fourth cause of action.

Tremblay, and that he commenced this action to further his own interests.

Jakob opposes the motion and argues that he can fairly represent the interests of the shareholders, as he has the support of three out of the seven remaining shareholders.

A party seeking to assert derivative claims must establish that he or she will "fairly and adequately represent the interests" of the corporate entity. *Gilbert v Kalikow*, 272 AD2d 63 (1st Dept 2000), *lv denied* 95 NY2d 761 (2000) (holding that derivative claims "were properly dismissed on the ground that plaintiff has failed to demonstrate that he will fairly and adequately represent the interests of the limited partnership, in view of the 'totality of the relationship' between himself and the individual defendant, his former son-in-law and business partner" [citation omitted]).

Here, the documentary evidence demonstrates that the position taken by Jakob in this action is not shared by the other shareholders. The proposed settlement agreement in the 2006 Action, of which Jakob now complains, was signed by six of Gershwin's eight shareholders, including Jakob's parents, Hans and Irma Jakob. Although Jakob submits an email dated March 13, 2008 from his father, in which it appears that his parents were

rescinding their signatures from "Suzanne's settlement agreement," there is no evidence that they ever attempted to revoke their formal consent or otherwise inform Gershwin or its other shareholders of their alleged change in position.

Moreover, while shareholder Carole Shandler did not sign the proposed agreement, there is no evidence regarding her reasons for failing to do so. Jakob's allegation that she refused to sign because she agreed it was unfair to Jakob and gave Tremblay a windfall, is disputed by the defendants who allege that she abstained because she had a conflict of interest.

Regardless, the minutes of the February 19, 2008 special shareholders' meeting demonstrate that the six shareholders present voted to approve the Wilder Shares. Carole Shandler was not present in person or by proxy, and Jakob called at the end of the day after the meeting was over and proceeded to fax his proxy reflecting votes against four of the Resolutions and abstention from one. The minutes also reflect that at shareholders' meetings held on April 10, 2007, February 19, 2008 and June 19, 2008, the shareholders voted to elect and re-elect Tremblay and Eckert to the Board, with the sole exception being Jakob himself, who either voted against Tremblay and/or Eckert or abstained each time. See Annual Shareholders' Apr. 10, 2007 Meeting Minutes Tr., at 20:6-9;

Minutes of Feb. 19, 2008 Special Meeting of Shareholders; Annual Shareholders' June 19, 2008 Meeting Minutes, at 3-4.

Further, at a special shareholders' meeting held on August 31, 2009, seven of the eight shareholders voted in favor of amending the Company bylaws to include an Article XII providing for the indemnification of directors and officers of Gershwin, and voted to approve the indemnification and advancement of expenses to cover legal fees incurred by Tremblay and Eckert in defending this action. Jakob was the only shareholder to oppose the resolution.

Moreover, Jakob's causes of action and allegations asserted in the Complaint demonstrate that the relief he seeks will inure to his own benefit, while adversely impacting the other shareholders or seeking to reverse the express will of the shareholders. Among other allegations, Jakob asserts that the defendants, as directors of Gershwin, breached their fiduciary duties to him and to Gershwin by unilaterally and wrongfully withholding at least \$302,000.00 of shareholder distributions from him, in what they claimed was an effort to recover sums loaned by Gershwin to Jakob and Tremblay during the course of their marriage. Clearly, however, the damages Jakob asserts were suffered by him alone and the claim is not on behalf of the Company or the shareholders.

For these reasons, the Court finds that the positions taken by Jakob in this action are at odds with the actions taken by six of the eight shareholders of Gershwin, and that Jakob is seeking relief that will primarily benefit him individually, at the expense of the other shareholders. As such, Jakob lacks standing to assert derivative claims on behalf of Gershwin, and thus that branch of the motion seeking to dismiss the first, second and third causes of action is granted.

Defendants also seek to dismiss Jakob's fifth cause of action for conversion, contending that this cause of action is based on Jakob's allegations that he has a right to payment of an unsegregated and unliquidated sum of money and that, as a matter of law, neither Tremblay nor Eckert can be held liable in their individual capacities, and Gershwin, who did not specifically move for dismissal, cannot be held liable in its capacity as a nominal defendant in this action.

In opposition, Jakob argues that he has sufficiently alleged a wrongful act of dominion over shareholder distributions belonging to him by defendants, and that he will be able to provide an exact figure once he is able to review Gershwin's financial information.

On a motion addressed to the sufficiency of the pleadings, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (citations omitted)" *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); see also CPLR 3211(a)(7). However, "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence,' are not presumed to be true and [are not] accorded every favorable inference." *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *aff'd* 94 NY2d 659 (2000), quoting *Kliebert v McKoan*, 228 AD2d 232 (1st Dept 1996), *lv denied* 89 NY2d 802 (1996); see also CPLR 3211(a)(1).

In the Complaint, Jakob alleges that, "[u]pon information defendants are withholding and exercising dominion and control over certain shareholder distributions belonging to plaintiff, without any legal right, and without the permission of, and indeed contrary to the instructions of plaintiff," and that such withholding constitutes conversion. (Complaint, ¶ 74).

Jakob also alleges that Eckert "secretly" prepared and circulated among the West Coast Shareholders an undated shareholder memorandum, entitled "Reasoning for settleing (sic)," in which

Eckert lists a variety of reasons for settling the 2006 Action including that the \$302,000.00 owed by Jakob to Gershwin was paid back into the Company and then distributed to shareholders. (Complaint, ¶¶ 32-43) According to Jakob, however, he did not pay any of the monies to Gershwin that were the subject of the 2006 Action. Rather, according to the Complaint, the alleged repayment was actually a withholding of Jakob's rightful shareholder distributions by Tremblay and Eckert. (Complaint, ¶ 39). Jakob alleges that once he discovered his distributions had been withheld, he objected and demanded an accounting in letters and an e-mail addressed to Tremblay, Eckert, and/or Lyman.

Defendants admit that Tremblay and Eckert, as Gershwin's co-directors, caused Gershwin to withhold payment of shareholder distributions to Jakob in order to offset a \$302,000.00 debt they believed was owed to the Company, but argue that Jakob's allegations do not state a cause of action for conversion.

"Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883 (1st Dept 1982). Where the property alleged to have been converted is money, "it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise

treated in a particular manner." *Republic of Haiti v Duvalier*, 211 AD2d 379, 384 (1st Dept 1995); see also *Payne v White*, 101 AD2d 975 (3d Dept 1984) (money maintained in a specifically identified bank account may be subject of conversion claim).

Jakob has failed to allege the existence of a specifically identifiable fund of money, alleging merely that defendants wrongfully withheld "certain shareholder distributions" due to him as a shareholder. The funds due him are not alleged to be segregated in a separate account, but rather Jakob alleges Gershwin failed to pay funds from the corporate accounts. Commingled funds cannot be subject to a claim of conversion. *Auguston v Spry*, 282 AD2d 489, 491 (2d Dept 2001).

In addition, Jakob's conversion claim is fatally defective because he has failed to allege facts sufficient to support a claim against Eckert and Tremblay individually. "When a dividend has lawfully been declared, the relation of debtor and creditor is created between the corporation and each stockholder for his proportion of the dividend. If the corporation refuses to pay, each stockholder may recover it in his own right in an action against the corporation." *Gordon v Elliman*, 306 NY 456, 459 (1954). A shareholder does not have a cause of action against the corporation's officers or directors, individually, for declared but

unpaid dividends. *Id.*; BCL 719, 720. Corporate officers and directors are not guarantors of the corporation's obligations, in the absence of a personal guaranty (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]), or specific allegations that the officer acted for his or her personal interests, rather than in the interest of the company (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109-110 [1st Dept 2002]), neither of which are present in Jakob's Complaint.

As to Jakob's cross-motion, pursuant to BCL 721 and 723(b)(2)(B), a corporation may amend its bylaws to provide for indemnification of corporate officers and directors of expenses incurred in the defense of a shareholders' derivative action, where the director or officer has been shown to have acted in good faith and in the best interest of the corporation. Section 723(c) of the BCL specifically provides that expenses incurred in defending a civil action "may be paid by the corporation in advance of the final disposition of such action . . . upon receipt of an undertaking by or on behalf of such director or officer"

The cross-motion is denied in its entirety, as Jakob lacks standing to assert any claims on behalf of the Company, as discussed *supra*. In addition, the documentary evidence submitted on this motion demonstrates that the majority of shareholders are

in favor of indemnification and the advance of funds to cover the individual defendants' litigation expenses.

In addition, Jakob does not contend that the procedures used to amend the bylaws and pass the resolution were improper in any way. Rather, he argues that an injunction or bond is necessary because the Court has made no ruling on whether Tremblay and Eckert acted in good faith. However, as Jakob's direct and derivative claims have been dismissed, there is no basis for such relief.

Accordingly, the motion by defendants Tremblay and Eckert to dismiss plaintiff's Complaint is granted as to them and as to the nominal defendant Gershwin Partners Inc., and the Clerk of the Court is directed to enter judgment in favor of defendants Gershwin Partners, Inc., Suzanne Tremblay and Peter Eckert dismissing this action in its entirety, with prejudice and without costs or disbursements.

This constitutes the decision and order of the Court.

Dated: June 21, 2011



Hon. Barbara R. Kapnick, J.S.C.

BARBARA R. KAPNICK
J.S.C.