

People v Coalition Against Breast Cancer, Inc.

2012 NY Slip Op 31130(U)

April 20, 2012

Supreme Court, Suffolk County

Docket Number: 20432-2011

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 01-31-2012
Motion Submit Date: 02-07-2012
Motion Sequence No.: 002 MD

[] FINAL
[x] NON FINAL

_____ X
THE PEOPLE OF THE STATE OF NEW YORK,
by ERIC T. SCHNEIDERMAN, Attorney General
of the State of New York,

Plaintiff,

-against-

COALITION AGAINST BREST CANCER, INC.,
ANDREW SMITH, DEBRA KOPPELMAN,
PATRICIA SCOTT, CAMPAIGN CENTER,
INC., and GARRETT MORGAN,

Defendants.

_____ X

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ORDERED that the motion (002) by defendants Coalition Against Breast Cancer, Inc., Andrew Smith, Debra Koppelman, and Patricia Scott for an order modifying the preliminary injunction pursuant to CPLR 6314 is denied with leave to renew; and it is further

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ORDERED that defendants' counsel is directed to pay into court the funds held in escrow within thirty days of service of this Order with notice of entry.

In this action the plaintiff, the Office of the Attorney General of the State of New York, alleges,

inter alia, that the defendants Andrew Smith, Debra Koppelman and Patricia Scott operated the defendant Coalition Against Breast Cancer (hereinafter "CABC") for their own personal benefit and private inurement, awarded themselves excessive compensation in amounts grossly disproportionate to the services actually provided to CABC, caused materially false and misleading reports to be filed with the Attorney General, failed to institute and maintain internal controls, caused and/or allowed CABC to make illegal loans to Smith and Koppelman, caused and/or allowed CABC to enter into a stock transaction with defendant Smith which was not in the best interest of the organization. The instant action was commenced on June 28, 2011. In their answer, CABC, Smith, Koppelman and Scott asserted a general denial.

Procedurally, by order dated November 1, 2011 (Pines, J.), this Court granted a preliminary injunction enjoining Smith, Koppelman and Scott from, *inter alia*, soliciting charitable contributions, entering into any agreement concerning the solicitation of charitable contributions, spending funds by or for the benefit of CABC, spending or transferring any funds in any retirement or deferred compensation account that has been funded by CABC, and from destroying or altering any records concerning the solicitation of any charitable contributions from the public to CABC. Shortly thereafter, defendants requested permission by the Office of the Attorney General to pay their legal fees out of CABC funds held in escrow by their attorney, which was declined.

Defendants CABC, Smith, Koppelman and Scott now move for an order pursuant to CPLR 6314 modifying the preliminary injunction to include an order directing CABC

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to pay their attorney fees pursuant to New York Not-For-Profit Corporations Law (“N-PCL”) § 724.

In support of the motion, defendants submit, *inter alia*, the pleadings, their attorney’s affirmation, a copy of the Court’s Order, dated November 1, 2011, copies of correspondence with the Office of the Attorney General, and copies of undertakings executed by Smith, Koppelman and Scott. The undertakings reveal that defendants agreed to repay the expenses and attorney fees that CABC paid in advance for them. In a letter to the Attorney General, dated December 1, 2011, defendants’ counsel states that his firm is holding virtually all of the remaining assets of the entity and the individuals tied to the entity in the form of retirement accounts totaling in excess of one hundred thousand dollars (\$100,000.00) in their escrow account.

In opposition, the Attorney General contends that the proof of the defendants’ self-dealing and bad faith fails to meet the requisite standard for advancement under the statute, namely that they acted in good faith for a purpose reasonably believed to be in the best interest of the corporation. In addition, the Attorney General affirms that there have been no compelling or changed circumstances to require a modification of the preliminary injunction. The Attorney General further contends that N-PCL § 723 does not apply, inasmuch as there is no dispute that the Certificate of Incorporation and By-laws of CABC are silent as to indemnification. In any event, the defendants, as the only three directors and/or officers of CABC, cannot act as disinterested directors or officers to provide a quorum to approve the payment by CABC of defendants’ legal fees.

A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court and may be granted upon “compelling or changed circumstances that render continuation of the injunction inequitable.” *Wellbilt Equip. Corp. v Red Eye Grill, LP*, 308 AD2d 411, 765 NYS2d 490 (1st Dept 2003); *see* CPLR 6314; *People v*

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Scanlon, 11 NY2d 459, 462, 230 NYS2d 708 (1962); *Board of Trustees v W. Wilton Wood*, 97 AD2d 781, 782, 468 NYS2d 520 (2d Dept 1983); *Dictograph Products. v Empire State Hearing Aid Bureau, Inc.*, 4 AD2d 508, 510, 167 NYS2d 541 (1st Dept 1957).

In determining whether the defendants are entitled to indemnification of their attorney fees, the Court looks to N-PCL § 722, which provides for a corporation to indemnify a director or officer for, *inter alia*, attorneys' fees incurred as a result of an action brought against them in their capacity of a director or officer of the corporation. Pursuant to N-PCL § 722 (a),

“Indemnification may be authorized where the director or officer
“acted, in good faith, for a purpose which he reasonably believed to
be in . . . the best interests of the corporation.”

Pursuant to N-PCL § 722 (c):

“. . . the court can determine upon application that the director or
officer is in fact entitled to indemnity for some portion of a settlement
amount and expenses which the court determines is fair and proper.”

N-PCL § 723 provides for payment of indemnification by the non profit corporation other than by court award, by a vote of disinterested directors, by corporate members, or by the opinion in writing of independent legal counsel that indemnification is proper in the circumstances because the applicable standard of conduct set forth in section 722 has been met. In this section, a director or officer may provide an undertaking to repay such amount.

Pursuant to N-PCL § 714 (a):

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“Notwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board or of its members in the specific case under section 723, indemnification shall be awarded by a court to the extent authorized under section 722.”

Pursuant to N-PCL § 724 (c):

“Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys’ fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.”

Here, the defendants have not demonstrated their entitlement to indemnification pursuant to N-PCL § 724 by their submissions. Defendants have failed to state that they acted in good faith for a purpose which they reasonably believed were in CABC’s best interests in the first instance. Secondly, defendants’ counsel’s affirmation and their undertakings are insufficient to show “genuine issues of fact or law.”

Accordingly, the defendants having failed to demonstrate compelling or changed circumstances which would render continuation of the injunction inequitable, their motion to vacate or modify the preliminary injunction is denied with leave to renew upon a proper showing or a change in circumstance. Defendants’ counsel is directed to pay into court the funds held in escrow.

Dated: April 20, 2012
Riverhead, New York



EMILY PINES
J. S. C.

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