

Matter of Wyatt v Inner City Broadcasting Corp

2012 NY Slip Op 33381(U)

March 26, 2012

Supreme Court, New York County

Docket Number: 112455/2011

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 112455/2011
WYATT, HUGH
vs.
INNER CITY BROADCASTING
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO.
MOTION DATE 3/2/12
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 3-9
Answering Affidavits — Exhibits No(s) None - No Opp
Replying Affidavits No(s)

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

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

Dated: 3/26/12

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: Part 54

-----X
In the Matter of the Application of HUGH WYATT,

Plaintiff,

Index No.: 112455/2011

-against-

INNER CITY BROADCASTING CORPORATION &
PIERRE E. SUTTON,

DECISION & ORDER

Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This is an action by a minority shareholder in defendant Inner City Broadcasting Corporation (ICBC) against that defendant and its chairman, Pierre E. Sutton. Plaintiff alleges various forms of misconduct by Sutton and seeks monetary damages as well as drastic forms of equitable relief. Sutton attests that this is the fifth action brought by plaintiff against ICBC since 2008, and that each of these suits were either dismissed or withdrawn. Sutton Aff., ¶ 3. Defendant now moves to dismiss this action pursuant to CPLR § 1001(a) and § 3211(a) (1), (3), (7), (10). Despite being served with notice of this motion and the supporting papers, plaintiff has not offered any opposition.

Background

Plaintiff alleges the following facts in his verified complaint. Defendant ICBC is a New York corporation, the primary asset of which is its equity stake in Inner City Media Corporation (ICMC)—specifically, 100% of the outstanding common stock and certain preferred shares which are convertible into common shares. ICMC and its subsidiaries own seventeen radio stations throughout the United States. Mr. Sutton is the founder and chairman of the board of directors of

ICBC. He and his family control a majority of the voting shares, and his daughter, Keisha Sutton-James, appears to work for ICBC in some capacity.

On August 8, 2011, “a Notice of Special Meeting of Shareholders of the Company was sent to shareholders calling a meeting to consider a restructuring of the debt and equity of the Company that would include the transfer to the senior lenders of substantially all of the common stock of ICMC.” Verified Compl., ¶ 11. Sutton presided over the meeting which was held ten days later and at which he announced that the board “had rejected the proposed restructuring and that there was nothing for the shareholders to consider.” *Id.* He stated further that “the directors of ICMC and [ICBC] had been replaced by ‘professional directors’ chosen by him” *Id.*, ¶ 11, 16.

The next day, ICMC and its subsidiaries’ (the Debtors) senior lenders (the Creditors) filed an involuntary Chapter 11 Bankruptcy petition against it in the Southern District of New York, and three weeks later, the Debtors consented to an order of relief commencing the Chapter 11 proceedings against them. *Id.*, ¶ 12-13.

Recently, “ICMC has announced that it and the senior lenders have reached an agreement in principal pursuant to which ICMC will implement a consensual pre-negotiated financial restructuring and ICMC and the senior lenders will file a plan of reorganization ... providing for the payment in full of unsecured claims.” Verified Compl., ¶ 14. In a related measure, “with the consent of the senior lenders, ICMC entered into an agreement with Robert J. Maccini retaining him as Chief Restructuring Officer of the Debtors with power to restructures [sic] the operations of the Debtors, including the power to terminate the employment of personnel.” *Id.*, ¶ 15. Perhaps importantly for certain of plaintiff’s claims, the “agreement specifically excludes from this power Defendant Sutton and his daughter, Keisha Sutton-James.” *Id.*

Finally, plaintiff alleges that “the Company owns property, including trademarks, copyrights, licenses and other intellectual property, that the senior lenders desire to have transferred to the Debtors as part of the restructuring” and he makes the conclusory allegation that “Defendant Sutton has through gross incompetence and self-dealing caused the bankruptcy of the business created and built up over the years by the Company and has enhanced the shareholdings of himself and his family to the detriment of the minority shareholders of the Company.” *Id.*, ¶ 17-18.

Plaintiff makes five distinct claims or requests for relief. First, he alleges that the “so-called professional directors on the Board of Directors of [ICBC] were selected, employed and paid for by Defendant Sutton and are not payable to represent the interests of other shareholders of [ICBC] in violation of General Corporation Law § 225.” Due to Sutton’s “domination” of these directors, plaintiff asserts that “[t]here is no officer or committee which can represent the interests of the minority shareholders of [ICBC] in negotiations with the senior lenders and Defendant Sutton concerning the cash and securities, if any, to be received by [ICBC] for its equity interest in ICMC and its property to be transferred to the Debtors in the reorganization.” *Id.*, ¶ 22. He, therefore, “requests the appointment of a receiver of the assets, operations and property of [ICBC] pending resolution of the chapter 11 proceeding and an order requiring the appointment of an independent committee of shareholders to approve transactions with the senior lenders and Defendant Sutton.” *Id.*, ¶ 23.

Second, he asserts that while a “consensual financial restructuring which amounts to a transfer to the Debtors of substantially all of the equity interest of [ICBC] in ICMC requires the approval of shareholders under the New York Business Corporation Law ... no financial

statements or other documents were given to shareholders.” *Id.*, ¶ 25-26. He, thus, “requests an order requiring full disclosure of all material information necessary to permit the shareholders to make an informed decision with respect to all proposed transactions between [ICBC] and the Debtors and/or the senior lenders to be voted upon by the shareholders.” *Id.*, ¶ 27.

Third, plaintiff alleges that the “so-called professional directors retained by Defendant Sutton have, on information and belief, been paid by [ICBC] for their services not only as directors of [ICBC] but as directors of ICMC. These directors have served only as a rubber stamp for Defendant Sutton and as a cloak for his self-dealing. This is a waste of [ICBC’s] assets.” *Id.*, ¶ 29. Plaintiff seeks reimbursement of these sums from Sutton and, despite the fact that it is not indicated in the caption, he states that “[t]his cause of action is brought derivatively on behalf of [ICBC].” *Id.*, ¶ 30.

Fourth, he states that ICBC’s insolvency is due to Sutton’s “gross mismanag[ement]” and “self-dealing loans and other transactions which have resulted in increases in the shareholdings of the Sutton family to the detriment of the other shareholders of [ICBC].” *Id.*, ¶ 33. He therefore “demands, derivatively on behalf of [ICBC], the sum of \$50 million as damages and the cancellation of the shares of common stock of [ICBC] which have been wrongfully transferred to Defendant Sutton and his family.” *Id.*, ¶ 34.

Fifth and finally, since he believes that “[u]pon completion of the chapter 11 bankruptcy proceeding relating to ICMC it appears that the property of [ICBC] may consist solely of cash and securities ... [plaintiff requests that] the Court issue an order dissolving [ICBC] pursuant to the New York Corporation Law [sic].” *Id.*, ¶ 36.

Defendant's Response

Individually and on behalf of ICBC, Sutton makes the following factual assertions. None of ICBC's directors were removed during the relevant time period. Sutton Aff., ¶ 5.

Instead, ICBC in its capacity as a shareholder of ICMC removed some of ICMC's directors. *Id.*, ¶ 6. ICBC does not pay any compensation to ICMC's directors [*Id.*, ¶ 7], and since its organizational restructuring in 2000 in which the various subsidiaries were created, the radio stations' operations were managed at the subsidiary level—not by the directors of ICBC. *Id.*, ¶ 8.

In regard to the allegations regarding the bankruptcy proceeding, Sutton attests that none of ICBC's assets will be transferred to the Debtors. *Id.*, ¶ 10. Further, the restructuring transaction repeatedly mentioned in the complaint is no longer being considered by the parties. *Id.*, ¶ 12. The shareholders' meeting referenced in the complaint was noticed while the board was contemplating the proposal. *Id.* However, the board rejected the proposal between when the notice was sent and the date of the meeting. *Id.* This is why no shareholder vote was held at this meeting.

As to plaintiff's ambiguous assertion of derivative claims on behalf of the company, Sutton attests that “[p]laintiff has never made a demand upon ICBC to take any action against me (or anyone else) pursuant to BCL § 626 for any of the claims he purports to raise in the Complaint as a derivative claim.” *Id.*, ¶ 14. Similarly, as to plaintiff's request for information from ICBC, Sutton attests that he “did not demand nor request any such information of ICBC nor has he complied with BCL § 624, regarding inspection rights.” *Id.*, ¶ 15.

Discussion

Dismissal pursuant to CPLR 3211(a)(7) (failure to state a cause of action) is required

when, accepting the facts as alleged in the complaint as true and according the plaintiff the benefit of every possible inference, the facts alleged do not fit within a cognizable legal theory. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *Skillgames, LLC. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). Accordingly, the inquiry on a motion to dismiss is narrow, and the court must liberally construe the complaint, accepting as true both its material allegations and whatever reasonably can be inferred from them. *Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45 (1st Dept 1993) citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *Demicco Bros., Inc. v Con. Ed. Co.*, 8 AD3d 99 (1st Dept 2004). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames, supra* quoting *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 233-234 (1st Dept 1994). Thus, “[a motion to dismiss] should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76 (1st Dept 1999). However, in assessing a motion under CPLR 3211, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635-636 (1976).

The facts as stated by plaintiff do not warrant the appointment of a receiver to manage ICBC’s affairs or the appointment of “an independent committee of shareholders to approve transactions with the senior lenders and Defendant Sutton.” First of all, given that it is uncontested that ICBC is a New York corporation, plaintiff’s contention that its board is unable to represent the company’s shareholders in violation of § 225 of *Delaware’s* General Corporation

Law, even if accurate, is irrelevant to this action. As for the appointment of a receiver, neither the Business Corporation Law nor the Civil Practice Law and Rules provide a basis for this drastic form of relief. BCL § 1202 permits the appointment of a receiver only in four enumerated situations, none of which are present in this action.

CPRL § 6401(a) provides that:

Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.

To justify the appointment of a receiver under this provision, “[t]here must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established.” *Matter of Armienti & Brooks*, 309 AD2d 659 (1st Dept 2003) quoting *Matter of Di Bona [General Rayfin]*, 45 AD2d 696 (1st Dept 1974). Establishment of the threat of irreparable loss generally must be made by the presentation of clear and convincing evidence. *See McBrien v Murphy*, 156 AD2d 140 (1st Dept 1989). Having failed to bring forth any evidence of a threat of irreparable loss to ICBC from Sutton and the other directors’ conduct, let alone clear and convincing evidence, this court has no basis to appoint a temporary receiver to manage the company’s affairs. Plaintiff’s wholly conclusory references to gross mismanagement and “self-dealing loans” are insufficient to justify such drastic relief. Similarly, plaintiff has not directed the court to any authority permitting it to order the establishment of an “independent committee of shareholders” to manage ICBC’s affairs.

Plaintiff's request for an order requiring disclosure of information relevant to a proposed "restructuring of the debt and equity of [ICBC]" apparently is no longer timely. Defendant attests, and plaintiff has offered no evidence to the contrary, that the proposed transaction mentioned in the complaint was rejected by ICBC's board of directors and is no longer being considered. Sutton Aff., ¶ 10-12. There being no presently contemplated transaction necessitating shareholder approval, plaintiff has failed to provide a compelling reason for the court to issue the order he seeks.

Plaintiff's third and fourth causes of action, both brought "derivatively on behalf of [ICBC]," seek damages against Sutton. BCL § 626(c) states that in a shareholder derivative action, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." Plaintiff has done neither in its complaint.

Additionally, CPLR § 3016(b) provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." On a more basic level, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR § 3013. The third and fourth causes of action appear to be based on alleged breaches of Sutton's fiduciary duties to ICBC. However, beyond accusing Sutton of "gross mismanaging" and of procuring "self-dealing loans," plaintiff makes no allegations nearly particularized enough to give Sutton notice of the specific conduct constituting the alleged "gross mismanaging" or the transactions he describes as "self-

dealing.” Thus, both for the failure to allege that the required demand on the board was made and the failure to plead the facts underlying the claims of breach of fiduciary duty with sufficient particularity, plaintiff’s third and fourth causes of action are dismissed.

Plaintiff’s final cause of action seeks an order of dissolution for ICBC. The requirements to make such a request are set forth in Article 11 of the Business Corporation Law. BCL § 1104(a) provides that:

Except as otherwise provided in the certificate of incorporation under section 613 (Limitations on right to vote), the holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:

- (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.
- (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.
- (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

Similarly, BCL § 1104-a(a) provides that:

The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled “Investment Company Act of 1940”, no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

- (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
- (2) The property or assets of the corporation are being looted, wasted, or diverted

for non-corporate purposes by its directors, officers or those in control of the corporation.

Plaintiff does not dispute Sutton's assertion that he owns less than one percent of the voting shares of ICBC. He, therefore, is not entitled to seek a judicial dissolution under the BCL.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted, on default, and all of plaintiff's claims are dismissed, with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 3/26/12

Enter: [Signature]
J.S.C.