

Core Software Tech., Inc. v ImageSat Intl., N.V.

2012 NY Slip Op 33891(U)

March 19, 2012

Supreme Court, New York County

Docket Number: 650062/10

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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CORE SOFTWARE TECHNOLOGY, INC.,	:
WIS PARTNERS, L.P., U.S. BANCORP,	:
INVESTMENTS, INC., IDI SCA, as successor to	:
FINANCIERE BAGATELLE, S.A., and	:
STEPHEN WILSON,	:
	:
	:
Plaintiffs,	:
	:
-against-	:
	:
	:
IMAGESAT INTERNATIONAL, N.V.,	:
ISRAEL AEROSPACE INDUSTRIES LTD.,	:
ELBIT SYSTEMS LTD., and ELBIT SYSTEMS	:
ELECTRO-OPTICS ELOP LTD.,	:
	:
	:
Defendants.	:
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Index No.: 650062/10

DECISION AND ORDER

Sequence No. 008

MELVIN L. SCHWEITZER, J.:

Plaintiffs seek to amend the complaint to, *inter alia*, update allegations of breaches of Section 3.6 of the Shareholders Agreement (SA), insert allegations of breach of Sections 3.4, 3.8 and 3.9 of the SA and explicitly state breaches of the implied covenant of good faith and fair dealing.

Standard of Review

CPLR 3025(b) requires that a leave to amend and supplement a complaint “be freely given.” In order to defeat a motion for leave to amend and supplement a complaint, defendants must show that they would be prejudiced if the motion were granted. *McCaskey, Davies and Assocs., Inc. v. New York City Health & Hosps. Corp.*, 59 NY 2d 755, 757 (1983) (“Leave to

amend the pleadings ‘shall be freely given,’ absent prejudice or surprise resulting directly from the delay.”).

A motion for leave to amend can also be defeated by a showing that the proposed amendment or amendments would be futile. *Rachmani Corp. v. 19th St. Assocs.*, 214 A.D.3d 358 (1st Dep’t 1995) (“[I]t was a proper exercise of discretion to refuse the proposed amendment to the fourth cause of action in view of the lack of any substance to a claim for breach of contract or fiduciary duty.”). However, a plaintiff need not decisively prove the merits of his proposed amendments in a motion for leave to amend and supplement, and if both the plaintiff and the defendant present strong arguments, the motion for leave to amend and supplement should be granted. *MBIA Ins. Corp v. Greystone & Co., Inc.*, N.Y.S.2d 522, 522 (1st Dep’t 2010) (“On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit, which it has done. Contrary to corporate defendant’s argument, the proposed amendment was supported by a sufficient showing of merit through the submission of an affirmation by counsel. . . .”); *Curiale v. Stephen Weicholz & G. Co., Inc., et al.*, 596 N.Y.S.2d 19, 20 (1st Dep’t 1996) (“While the parties dispute the amount of unearned insurance premiums owed to the Superintendent and whether certain reinsurance premium payments were legitimately made, resolution of the merits of these claims is not appropriate under a CPLR 3025(b) motion to amend a pleading.”).

Discussion

On January 5, 2012 Plaintiffs, Core Software Technology, Inc. *et al.*, brought a Motion for Leave to Amend and Supplement the Complaint, requesting an oral argument. In general, plaintiffs argue that since the filing of the original complaint on January 22, 2010, circumstances

have changed such that they must now make changes to the original complaint. Mr. Stephen M. Wilson and Ira Brad Matetstky's affidavits in support of the motion summarize the amendments in the following way:

(1) The amended complaint updates plaintiffs' allegations of breach of Section 3.6 of the SA. Plaintiffs argue that it is necessary to amend this part of the complaint because, although the appointment of independent directors is already underway, and this court has concluded that the SA calls for three independent directors, defendants have violated and, unless the court intervenes, will continue to violate this provision. Plaintiffs present factual allegations to elaborate on the ways that defendants have allegedly ensured that no truly independent directors are appointed.

(2) The amended complaint adds allegations regarding breaches of Section 3.9, arguing that a series of defendants' actions have exposed ImageSat to the Israeli Government Corporations Law, in direct violation of this section of the SA.

(3) The amended complaint adds allegations regarding breaches of Sections 3.4 and 3.8, arguing that defendants Israel Aerospace Industries Ltd. (IAI) and Elbit directors vote as a block, in direct violation of these sections.

(4) The amended complaint expressly states that the plaintiffs rely on the covenant of good faith and fair dealing implied as a matter of law into the SA and each provision thereof, in addition to the express terms of the agreement, when arguing their single cause of action of breach of contract.

(5) Portions of the complaint's facts that had been detailed in the original complaint are now summarized in the interest of streamlining.

(6) Facts from 2010 and 2011 were added, including facts related to the Board's failure to discuss the selection of independent directors at any of its meetings during this two year period.

(7) Specific relief sought by plaintiffs has been defined with greater specificity and updated in light of current circumstances.

(8) Stephen M. Wilson has been dropped as a plaintiff in light of this court's prior ruling dismissing him as an individual party in the action.

In response to plaintiffs' Motion for Leave to Amend and Supplement the Complaint, defendants argue that this is an attempt by plaintiffs to (i) litigate certain claims that have already been resolved by this court in an order issued on July 8, 2010, (ii) reverse this order regarding the manner in which the ImageSat International N.V. (ImageSat) board identifies independent director candidates, (iii) deny IAI contractual rights upon which it relied when it purchased interests of the note holders in ImageSat, (iv) prevent the transfer of IAI's contractual rights as a holder of the notes, (v) prevent the transfer of IAI's contractual rights as purchaser representative to another person or entity, and (vi) reconfigure the board of directors of a foreign corporation to remove the current Chairman.

Defendants argue that the proposed amendments regarding Section 3.6 are refuted by the terms of the SA and raise issues already resolved by this court. Defendants also argue that the proposed amended complaint does not state a claim for breach of Section 3.9. Further, they assert plaintiffs' claims of defendants' breach of Sections 3.4 and 3.8 are invalid because these sections deal with shareholders voting as a block, not directors voting as a block, as implied by plaintiffs. They say this is a question of breach of fiduciary duty, which is outside of the

jurisdiction of this court. Finally, they argue the amended complaint fails to establish that defendants breached the implied covenant of good faith and fair dealing.

Discussion and Order

Defendants have not shown that granting plaintiffs' motion to amend would result in prejudice. Defendants only take issue with the merits of plaintiffs' proposed amendments. In particular, defendants argue that some of the proposed amendments are moot because this court has disposed of such issues, and that other proposed amendments are clearly meritless on their face. Plaintiffs have provided colorable arguments for their proposed amendments. Defendants' arguments are better reserved for a motion for summary judgment. All that this court needs to consider under a CPLR 3025(b) motion is whether granting the motion would result in prejudice toward the defendant or whether the proposed amendments are clearly devoid of merit. We find that neither is the case. The court grants plaintiffs' Motion for Leave to Amend and Supplement the Complaint.

Accordingly, it is

ORDERED that plaintiffs' motion to amend and supplement the complaint is granted.

Dated: March 19, 2012

ENTER:


J.S.C.

MELVIN L. SCHWEITZER
J.S.C.