

Blackman v Nylund
2013 NY Slip Op 33126(U)
December 10, 2013
Supreme Court, New York County
Docket Number: 653290/2013
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
JusticeBlackmanINDEX NO. 653290/2013MOTION DATE 10/25/13MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

Nyland

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

21-2333-82117-118Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.Dated: 12/10/13SHIRLEY WERNER KORNREICH
J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCE☐ SUBMIT ORDER/ JUDG.☐ SETTLE ORDER/ JUDG.MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----X
URI AARON BLACKMAN, derivatively on behalf of
ASSURA GROUP OF NY, LTD.,

Index No.: 653290/2013

DECISION & ORDER

Plaintiff,

-against-

LESLIE NYLUND, individually, and STERLING &
STERLING, INC., LAWRENCE SOLOMON,
MICHAEL SULLIVAN, RICHARD S. PZENA
and C. THOMAS GALLAGHER,

Defendants,

-and-

ASSURA GROUP OF NY, LTD., a New York
Corporation,

Nominal Defendant.

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

Plaintiff Uri Aaron Blackman moves by order to show cause for a preliminary injunction, pursuant to CPLR 6301, to enjoin nominal defendant Assura Group of NY, Ltd. (Assura) from closing on a sale of its assets to non-party Great American Insurance Company (GAIC). Defendants Leslie Nylund and Sterling & Sterling, Inc. cross-move to dismiss the claims in the Complaint asserted against them. The motion and cross-motion are denied for the reasons that follow.

I. Procedural History

On September 23, 2013, Blackman commenced this action and obtained an *ex parte* temporary restraining order (the TRO) from another Justice, stopping the sale to GAIC. The case was transferred to this Justice and a hearing was held, during which the court vacated the TRO, but reserved on the injunction and dismissal motions. After the motions were fully submitted, Blackman filed an amended complaint (the AC), and motions to dismiss the AC have been filed

and are currently being briefed. Thus, the court denies the instant cross-motion to dismiss the Complaint without prejudice. The motion to dismiss will be considered as to the AC. The court, therefore, will recite only the facts necessary to decide the injunction motion.

II. Factual Background

Assura is a closely-held New York corporation founded in 2006. Its only significant assets are an insurance product (IncomeAssure) and a related software platform. IncomeAssure is a private sector unemployment insurance policy, designed for people who wish to supplement their government unemployment benefits. Assura has been unsuccessful at selling policies and is in a dire financial situation. In early 2013, after attempts to raise capital failed, Assura sought to sell IncomeAssure. Ultimately, Assura reached an agreement with GAIC, a large insurance company which had been providing Assura with underwriting and back office services. Blackman, one of Assura's co-founders and a minority equity holder, proposed his own offer to purchase IncomeAssure. The primary difference between the offers is that the GAIC proposal provides little up-front cash but the possibility of royalties while the Blackman offer is front-loaded with cash. The court will not assess the merits of the proposed transactions because, as discussed below, Assura's board's decision to accept GAIC's offer instead of Blackman's is not subject to the court's scrutiny under the business judgment rule. That being said, it is clear that the GAIC deal is not the worthless transaction described by Blackman. GAIC is a large insurance company with myriad advantages over Blackman, such as the superior ability to underwrite, market, and service policies.

II. Discussion

To succeed on a motion for a preliminary injunction, the movant must demonstrate a likelihood of ultimate success on the merits, that irreparable injury would result in the absence of

injunctive relief, and that a balancing of the equities to effect substantial justice and to preserve the status quo warrants the grant of this extraordinary relief. CPLR 6301; *Key Drug Co. v Luna Park Realty Assoc.*, 221 AD2d 598, 599 (2d Dept 1995); *Pilgreen v 91 Fifth Ave. Corp.*, 91 AD2d 565, 567 (1st Dept 1982), *app dismissed*, 58 NY2d 1113 (1983). Additionally, the movant “must demonstrate a clear right to relief which is plain from the undisputed facts,” to establish its likelihood of success. *Blueberries Gourmet Inc. v Aris Realty Corp.*, 255 AD2d 348, 349-50 (2d Dept 1998). Where questions of fact exist which would substantially subvert the movant’s likelihood of ultimate success, an injunction should not be granted. *Adv. Digital Sec. Solutions, Inc. v Samsung Techwin Co.*, 53 AD3d 612, 613 (2d Dept 2008). Furthermore, “economic loss, which is compensable by money damages, does not constitute irreparable harm” and so does not justify injunctive relief. *DiFabio v Omnipoint Comm’s Inc.*, 66 AD3d 635, 637 (2d Dept 2009), quoting *Walsh v Design Concepts*, 221 AD2d 454, 455 (2d Dept 1995).

Pursuant to BCL 626(c), to maintain a derivative claim, the plaintiff must establish demand futility by pleading the following with particularity: “(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction.” *In re Comverse Technology, Inc.*, 56 AD3d 49, 53-54 (1st Dept 2008), quoting *Marx v Akers*, 88 NY2d 189, 198 (1996). “[T]he business judgment rule prohibits judicial inquiry into actions of corporate directors ‘taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.’” *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-38 (1990), quoting *Auerbach v Bennett*, 47 NY2d 619, 629 (1979). “So long as the corporation’s directors have not breached their fiduciary obligation to the corporation, ‘the exercise of [their powers] for the common and general interests of the corporation may not be questioned, [even if] the results show that what they did was unwise or inexpedient.’” *Levandusky*,

75 NY2d at 538, quoting *Pollitz v Wabash R. Co.*, 207 NY 113, 124 (1912). The business judgment rule presumptively applies unless “the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors.” *Marx*, 88 NY2d at 200-01.

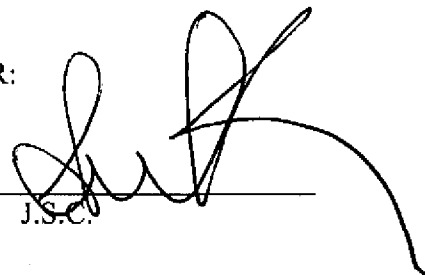
Blackman has not established a likelihood of success on the merits. His protestations about the relative superiority of his offer are inapposite since there is no evidence that Assura’s board acted improperly or without apprising themselves as to the merits of the offers. Likewise, there is no evidence to support Blackman’s contention that the individual defendants acted unlawfully. Blackman’s disappointment in the outcome of negotiations¹ is an insufficient basis to enjoin the sale. It is Assura’s board, not Blackman, that gets to decide which transaction is in the best interest of the company. Indeed, Assura’s shareholders overwhelmingly agree with the Board’s decision, a majority of which have refused Blackman’s tender offer. Blackman’s motion for a preliminary injunction is therefore denied. Accordingly, it is

ORDERED that the preliminary injunction motion of plaintiff Uri Aaron Blackman is denied; and it is further

ORDERED that the cross motion to dismiss by defendants Leslie Nylund and Sterling & Sterling is denied without prejudice.

Dated: December 10, 2013

ENTER:



J.S.C.

¹ It should be noted that if anyone qualifies as interested in the subject transaction, it is Blackman, not the board member defendants, since Blackman obviously has a pecuniary interest in obtaining the right to make money off IncomeAssure.