Elting v Shawe
2014 NY Slip Op 32126(U)
July 24, 2014
Sup Ct, New York County
Docket Number: 651423/2014
Judge: Melvin L. Schweitzer

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

ELIZABETH ELTING, on behalf of herself and derivatively on behalf of nominal defendant TRANSPERFECT GLOBAL, INC.,	
Plaintiff,	Index No. 651423/2014
-against-	DECISION AND ORDER
PHILIP SHAWE,	Motion Sequence No. 005
Defendant,	
and	
TRANSPERFECT GLOBAL, INC., and TRANSPERFECT TRANSLATIONS INTERNATIONAL, INC.,	
Nominal Defendants.	

MELVIN L. SCHWEITZER, J.:

In this action, Elizabeth Elting (Ms. Elting) asserts various claims, both directly, and derivatively on behalf of TransPerfect Global, Inc. (TPG), seeking removal of Philip Shawe (Mr. Shawe) as a director and officer of TransPerfect Translations International, Inc. (TPI), dissolution of TPI, and relief for breach of fiduciary duty. Defendant moves to dismiss the amended complaint pursuant to CPLR 3211, on the grounds of *forum non conveniens*, lack of standing, and failure to state a claim.

Background

Structure of the Business Entity

Ms. Elting and Mr. Shawe are co-CEOs and the only directors of TPG, a Delaware corporation, which provides international translation services. TPG is the parent holding company of TPI. TPI is also an international translations services company, incorporated in

New York and headquartered in New York City. TPI, with its subsidiaries, has approximately 2,500 employees and $353 million in annual revenues. This amount constitutes 90% of the revenues of TPG. Ms. Elting and Mr. Shawe are co-CEOs and the only directors of TPI. TPI's sister subsidiaries collectively have approximately 800 employees and $40 million in annual revenues.

As part of a corporate restructuring in 2008, the then shareholders of TPI – Ms. Elting, Mr. Shawe, and Mr. Shawe's mother, Shirley Shawe (a 1 percent shareholder) – transferred their shares in TPI to TPG. As a result of the restructuring, TPG owns 100 percent of TPI's capital stock, and Ms. Elting, Mr. Shawe, and Shirley Shawe own 50 percent, 49 percent, and 1 percent, respectively, of TPG's capital stock.

Over the years, Mr. Shawe and Ms. Elting divided management responsibility for TPI operations in accordance with their respective talents and skills. Ms. Elting leads the document translation and interpretation services divisions, and Mr. Shawe leads the document website and software localization, technology solutions and supplemental services divisions. There are also shared divisions that relate to the general management of TPI, which they run jointly.

Allegations of Mr. Shawe's Misconduct

Ms. Elting alleges that Mr. Shawe in the recent past, and present, has engaged in erratic and abusive behavior in the discharge of his management responsibilities, including:

- Secretly implementing raises and bonuses in violation of more than 20 years of TPI policy requiring that Mr. Shawe and Ms. Elting jointly approve such action – including issuing a directive to TPI's Chief Information Officer, Yu-Kai Ng (Mr. Ng) to take the computer of Gale Boodram (Ms. Boodram), the employee who handles payroll, "out of adp and kill her phones," causing a "payroll crisis" at TPI;

- Refusing to agree to ADP Payroll Services' (ADP) subsequent requests for joint instruction from Ms. Elting and Mr. Shawe regarding payroll, which exacerbated the crisis, nearly causing TPI to miss payroll for its 2,250 domestic employees;

- Persistently and profanely harassing, abusing, threatening and intimidating Ms. Boodram;

- Blocking emails from TPI's bank, payroll company, and accountants from reaching TPI; and

- Violating Ms. Elting's direct instruction concerning the payment of her personal income taxes, resulting in a double payment of her taxes.

Mr. Shawe eliminated Ms. Boodram's access to TPI's computer network on May 7, 2014, which nearly prevented TPI from paying bonuses and commissions to hundreds of employees that were about to be due and salaries to its domestic employees. This conduct persuaded Ms. Elting to commence this action, and to obtain a TRO (issued by Justice Scarpulla) that prohibited Mr. Shawe from: (i) interfering with TPI's payroll; (ii) changing or restricting access to TPI's computer systems; and (iii) communicating with Ms. Boodram.

Ms. Elting alleges further misconduct by Mr. Shawe after issuance of the TRO, including conduct that violates the TRO. Despite being restrained from interfering with payroll, Mr. Shawe allegedly delayed a crucial approval to ADP to restore ordinary payroll procedures at a time when ADP was threatening to stop payroll payments. This required Ms. Elting's counsel to provide ADP with a copy of the TRO in order to facilitate the payroll payment process. In addition, despite being restrained from communicating "directly or indirectly" with Ms. Boodram and from disparaging her, Mr. Shawe included her on an incendiary email. Mr. Shawe also sent over 200 emails to employees, including Ms. Elting, demanding raises for employees who participated in Mr. Shawe's attempt to make unilateral changes to payroll, and making misrepresentations that Ms. Elting's counsel was "bugging" TPI emails. She also

alleges Mr. Shawe is endangering TPI's tax status by refusing to pay additional distributions necessary to ensure the proportionality of tax payments. This refusal allegedly exposes both Ms. Elting and Mr. Shawe to potentially ruinous tax liability.

Allegations of Ms. Elting's Misconduct

Mr. Shawe's counter allegations are that Ms. Elting became increasingly hostile in early 2013, and demanded excessive distributions. Further, on a number of occasions, Ms. Elting has refused to consider any acquisition opportunities. Mr. Shawe asserts that Ms. Elting was taking actions designed to seize control of the banking and accounting functions of TPI, and to retaliate against the back office employees who she deemed loyal to him. He alleges a pattern of financial misconduct by Ms. Elting, including unauthorized distributions of TPI funds. One such distribution was made in the amount of $21 million to pay for Ms. Elting's personal taxes, at a time when TPI needed the cash. At least $9 million of this distribution was transferred over Mr. Shawe's explicit objection, and by coercing finance department employees.

Mr. Shawe alleges that in August 2013, despite his instructions, Ms. Boodram processed payroll for his divisions, without including Fiona Asmah (Ms. Asmah), the employee Mr. Shawe designated to handle payroll for his divisions. He also alleges that Ms. Boodram, with Ms. Elting's authorization, paid herself a $25,000 bonus, directly contrary to a previous agreement between the parties that no change would be made in her compensation without joint consent. Mr. Shawe also alleges that Ms. Elting's personal housekeeper was carried on TPI's books as an "executive assistant," and that Ms. Elting misappropriated TPG funds by causing TPG to pay approximately $144,000 to the law firm of Kramer Levin Naftalis & Frankel LLP for her personal account.

In accordance with TPI's normal process, annual raises for the shared services group were entered into the payroll system by the human resources group (HR). In March 2014, however, Ms. Elting instructed both HR and Ms. Boodram to withhold raises for certain employees reporting to Roy Trujillo (Mr. Trujillo) and Mr. Ng, both of whom she perceived as loyal to Mr. Shawe, after which she left the country on a business trip to Asia. Upon discovering this, Mr. Shawe unilaterally had the finance staff put through a supplemental payroll for employees whose raises had been blocked by Ms. Elting. When Ms. Elting returned from Asia, she reversed the supplemental payroll over Mr. Shawe's objection, and without any notice to employees. In the face of complaints from employees, and the risks posed under New York Labor Law, Ms. Elting reprocessed the raises except for those to Ms. Asmah and Mr. Ng. Additionally, on March 8, 2014, Ms. Elting and Ms. Boodram locked out Mr. Ng from his historical access to ADP.

Delaware Litigation

On May 22, 2014, Mr. Shawe commenced an action against Ms. Elting in Delaware, asserting claims for, among other things, breach of fiduciary duty and corporate waste. On May 23, 2014, Ms. Elting filed a petition in Delaware seeking a decree of judicial dissolution of TPG and appointment of a custodian or a receiver. The Delaware dissolution petition incorporates by reference allegations in the amended complaint filed in this action.

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are

discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1997)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Standing for Removal Claims

Defendant's motion to dismiss the first and second counts of the amended complaint, seeking removal of Mr. Shawe as a director and officer of TPI, is granted because Ms. Elting lacks standing to sue directly under BCL 706 (d) or 716 (c). Only the Attorney General and the holders of 10 percent or more of a company's outstanding shares can assert causes of action under these sections. A cause of action asserted by a person who does not own 10 percent or more of the outstanding shares of the company in question must be dismissed. *See Lee v 993-995 6 Ave. Corp.*, 1999 WL 35141083 (Sup Ct, NY County Sept. 9, 1999, No. 602540/98); *Martin-Trigona v Capital Cities/ABC, Inc.*, 145 Misc 2d 405 (Sup Ct, NY County 1989). Although Ms. Elting previously owned shares of TPI, in 2008 she transferred those shares to TPG in exchange for an equivalent proportion of the shares of TPG. As a result of that transfer, Ms. Elting currently owns no shares of TPI. Rather, TPG owns 100 percent of the outstanding shares of TPI, while Ms. Elting owns 50 percent of the outstanding shares of TPG. Although plaintiff asserts that she is entitled to bring suit as the beneficial owner of more than 10 percent of TPI, the statute contains no reference to beneficial ownership. Nor does the case law cited support this contention.

Defendant's motion to dismiss the third and fourth counts of the amended complaint, seeking removal of Mr. Shawe as a director and officer of TPI, is denied because Ms. Elting has standing to sue derivatively under BCL 706 (d) and 716 (c). Because TPG owns 100 percent of

TPI's stock, TPG has standing to assert claims under these sections to remove Mr. Shawe from his positions. As a 50 percent shareholder of TPG, Ms. Elting has the right to assert derivative claims on its behalf. *See Boulden v Albiorix, Inc.*, C.A. No. 751-VCN, 2013 WL 396254, at *17 (Del Ch Jan. 31, 2013). Mr. Shawe essentially argues that derivative actions should be prohibited under BCL 706 (d) and 716 (c). There is no support for this proposition.

Standing for Dissolution Claim

Defendant's motion to dismiss the fifth count of the amended complaint, asserting a derivative claim on behalf of TPG to dissolve TPI under BCL 1104 (a), is granted because plaintiff lacks standing. Under the statute, a petition for dissolution may be asserted only by "the holders of shares representing one-half of the votes of all outstanding shares entitled to vote in an election of directors." BCL 1104 (a). Holders of more (or less) than one-half of the votes of all outstanding shares in a corporation cannot avail themselves of BCL 1104 (a). *See Rust v Turgeon*, 295 AD2d 962, 963 (4th Dept 2002) (plaintiff lacked standing to assert a claim under BCL 1104 (a) where he alleged, in effect, that he owned 100 percent of the shares of the corporation in question). The statute is intended for situations in which there is 50/50 deadlock between shareholders. *See* Thomas J. McNamara, *The Law of Corporate Divorce*, NYLJ, Feb. 18, 2004, at 1, col 3) (describing deadlock under BCL 1104 as "intense personal hostility between two 50/50 shareholders"); 16 Fletcher Cyc. Corp. 7713 (explaining that a receiver is properly appointed where there is such dissension . . . between sets of shareholders owning *equal* amounts of shares") (emphasis added). Here, as Ms. Elting admits, TPG (on whose behalf she purports to sue) is "the sole owner and 100 percent shareholder of" TPI. Thus, TPG has no right to assert a claim for dissolution under BCL 1104 (a). *See Rust*, 295 AD2d at 963.

Plaintiff cites *Artigas* as precedent for the proposition that under BCL 1104 (a), a petitioner for dissolution can own more than a 50 percent interest in a company's voting shares. *Artigas v Renewal Arts Realty Corp.*, 22 AD3d 327 (1st Dept 2005) ("the petitioner must represent at least one-half of the votes in case of deadlock"). Because the plaintiff in *Artigas* owned no shares in the subject corporation, the court's remarks were *dicta*. Additionally, plaintiff's interpretation of the statute is inconsistent with the terms of BCL 1104 (a). Unlike 1104 (b), which provides that "a petition may be presented by . . . *more* than one-third of the votes" (emphasis added), 1104 (a) does not contain any provision permitting holders of shares representing more than 50 percent of the votes to bring a claim for dissolution.

BCL 1104 (a)-(b).

Forum Non Conveniens

Defendant's motion to dismiss the amended complaint on the grounds of *forum non conveniens* is denied. CPLR 327 (a) provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just." The burden is squarely on the defendant, and it is a "heavy burden [to] demonstrat[e] that the forum chosen by [the plaintiff] is an inappropriate one." *Banco Ambrosiano, S.P.A. v Artoc Bank & Trust Ltd.*, 62 NY2d 65, 74 (1984); *see also Rational Strategies*, 2013 WL 3779731, at *4; *Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.P.A.*, 26 AD3d 286, 287 (1st Dept 2006) (noting defendant's "heavy burden" in a *forum non conveniens* analysis). At the same time, New York "should not be under compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 (1972).

The decision to dismiss on *forum non conveniens* grounds is discretionary. When considering *forum non conveniens* arguments, New York courts require a "substantial nexus" to the state. *See e.g. id.* at 361; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 (1984) (dismissing case lacking substantial nexus to New York); *Shin-Etsu Chem. Co. v 3033 ICICI Bank Ltd.*, 9 AD3d 171 (1st Dept 2004) (same). To determine a "substantial nexus," New York courts look at a number of factors, including "the burden on New York courts, the potential hardship to the defendant, the availability of an alternative forum, the residency of both parties, and the place of the transaction from which the cause of action arose." *Rational Strategies*, 2013 WL 3779731, at *4 (citing *Islamic Republic of Iran*, 62 NY2d at 479).

All of the *Rational Strategies* factors militate in favor of maintaining this action. First, "[t]here has been no showing that retention of the action would unduly burden the Commercial Division, a specialized commercial court that has been successfully handling complex commercial and corporate litigation since its inception in 1993." *In re Topps Co. S'holder Litig.*, 19 Misc 3d 1103(A), 2007 WL 5018882, at *6 (Sup Ct NY County 2007). New York, as a preeminent commercial center, has a significant interest in adjudicating this dispute because of TPI's hundreds of employees and significant revenue generated in New York. TPI is headquartered in New York, the relevant events transpired within New York, and the parties reside in New York. "New York has a special responsibility to protect its citizens from questionable corporate acts when a corporation . . . has substantial contacts with this State." *Broida v Bancroft*, 103 AD2d 88, 92 (2d Dept 1984). Accordingly, it does not burden New York courts to adjudicate this case. Further, Mr. Shawe has not demonstrated any hardship from litigating in New York, nor is it a burden to litigate distinct claims in multiple states.

Additionally, Delaware is not an available alternative forum because Ms. Elting's claim to dissolve TPI, a New York corporation, cannot be heard in Delaware.

Because the court dismisses Ms. Elting's claim for dissolution due to lack of standing under BCL 1104, the only pending dissolution claim is the claim in Delaware for dissolution of TPG. Consequently, the court does not need to consider the risk of inconsistent outcomes regarding dissolution in analyzing Mr. Shawe's *forum non conveniens* argument. Furthermore, this court rejects the contention that removal of Mr. Shawe from TPI would invite chaos with respect to the management of TPG and its subsidiaries. If Mr. Shawe is removed from TPI and still remains in his position at TPG, it is unlikely that his role in the parent company would have any material effects on the management of TPI. Alternatively, if Mr. Shawe remains in his role at TPI, and the Delaware court dissolves TPG, the dissolution is completely independent of removal and does not directly contradict any decision of this court.

Mr. Shawe's sole remaining argument for dismissing this action on grounds of *forum non conveniens* is that only Ms. Elting's dissolution claim in Delaware can provide her with full relief. This argument fails because it is speculative. For example, if Ms. Elting deems her ultimate relief to be removal of Mr. Shawe from TPI, she may at some point withdraw her TPG dissolution claim. Defendant essentially argues that the dissolution claim in Delaware trumps plaintiff's removal action in New York. The court will not speculate that dissolution of TPG is Ms. Elting's ultimate relief.

Breach of Fiduciary Duty

Defendant's motion to dismiss the sixth count of the amended complaint, asserting a breach of fiduciary duty, is denied. Mr. Shawe argues that a shareholder's exclusive avenue to seek removal of a director of a corporation is pursuant to, and by operation of, state law,

BCL 706, 716. *See Application of Burkin*, 1 NY2d 570, 574 (holding that a shareholder could sue to remove a director only under the predecessor to BCL 706); *see also Robertson v Bullions*, 11 NY 243, 252-54 (1854) (holding that the existence of an express statutory right to remove officers "affords affirmative evidence, that independent of the statute, the power did not exist"). Ms. Elting does not cite any precedent to the contrary. Common law removal based on a breach of fiduciary duty is not an available remedy.

However, the fiduciary duty claim is not dismissed merely because one of the requested forms of relief, i.e. removal is unavailable. Regardless of whether Mr. Shawe's alleged breach of fiduciary duty is a predicate for his removal as a director, damages remain an appropriate form of relief for this claim. Accordingly, the sixth count of the amended complaint is not dismissed.

Adequacy of Derivative Plaintiff

Defendant's motion to dismiss the derivative claims in the amended complaint on the grounds that Ms. Elting is an inadequate derivative representative is denied. To be an "adequate" representative, "the plaintiff in a derivative action must be qualified to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative's adequate and fair prosecution." *Youngman v Tahmoush*, 457 A2d 376, 379 (Del Ch 1983). Courts "consider a variety of factors in determining the adequacy of a representative plaintiff."

Those factors include:

> economic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation or other litigation pending between the plaintiff and defendants; the relative

> magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; plaintiff's vindictiveness toward the defendants, and, finally, the degree of support plaintiff was receiving from the shareholders he purported to represent. *Youngman*, 457 A2d at 379-80.

Here, there are no serious conflicts based on any of these factors. Defendant unpersuasively argues that Ms. Elting is acting in furtherance of her own interest rather than those of the other shareholders. Ms. Elting's economic interest is directly aligned with that of the other shareholders of TPG, because maximizing TPG's value and profitability benefits all shareholders. In this case, holding that Ms. Elting is an inadequate derivative representative is tantamount to adopting a per se rule that a 50 percent shareholder, where there is only one other involved shareholder, is never an adequate derivative representative. The court rejects this notion.

Conclusion

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss plaintiff's first and second causes for lack of standing of action is granted; and it is further

ORDERED that defendant's motion to dismiss plaintiff's third and fourth causes of action for lack of standing is denied; and it is further

ORDERED that defendant's motion to dismiss plaintiff's fifth cause of action for lack of standing is granted; and it is further

ORDERED that defendant's motion to dismiss the amended complaint on grounds of *forum non conveniens* is denied; and it is further

ORDERED that defendant's motion to dismiss plaintiff's sixth cause of action is denied; and it is further

ORDERED that defendant's motion to dismiss plaintiff's derivative causes of action on grounds that plaintiff cannot adequately and fairly represent TPG or the other shareholder is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 218, 60 Centre Street, New York, NY, on September 25, 2014 at 10:30 a.m.

Dated: July 24, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER