

384 Grand St. Hous. Dev. Fund Co., Inc. v Mo

2015 NY Slip Op 30139(U)

February 2, 2015

Supreme Court, New York County

Docket Number: 156298/2012

Judge: Peter H. Moulton

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Supreme Court: New York County
Part 57

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384 Grand Street Housing Development
Fund Company, Inc.

Plaintiff,

-against-

Index No.
156298/2012

Eddie Mo, Jan He, Flora Si, Allen Cohen,
Jenny Low, Herbert Kee and Virginia Kee,

Defendants.

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Peter H. Moulton, Justice

Plaintiff in this proceeding is a not for profit corporation that owns a rental building for elderly and handicapped people located at 384 Grand Street in Manhattan. Defendants are individuals who were members and board members of plaintiff during the relevant period. Plaintiff brings this action to recover legal fees that defendants authorized to defend a disputed board election in December 2007. That election was eventually nullified in a decision by Justice Madden. Plaintiff alleges that the expenditure of corporate funds to defend the election was a breach of fiduciary duty that constituted corporate waste. The complaint also contains a cause of action arising under New York's Not-For-Profit Corporation Law §§ 717, 720. The parties now cross-move for summary judgment.

BACKGROUND

The plaintiff not-for-profit corporation was formed in 1984 to provide affordable housing for senior citizens. In 2004 five people were elected as directors of the corporation: Thomas Tan, John Chang, Eddie Mo, Mike Lee, and Douglas Hong. Eddie Mo ("Mo") was elected president.

In the mid-2000s a dispute arose between two factions of the plaintiff's members concerning the future direction of the corporation and the status of 384 Grand Street. Mo was a member of one faction and director Douglas Hong a member of the other. The Mo faction averred that Hong was interested in turning the corporation's building at 384 Grand Street into a for profit enterprise. Mo contended that he and his colleagues wished to continue the corporation's vision to serve low and moderate income tenants. For his part, Hong avers that Mo called no membership meetings in 2005 and 2006 and that Mo cancelled an August 2007 membership meeting. Hong alleges that he and others protested this action and tried to get the board to hold a membership meeting. Hong also avers that the two factions disagreed about whether to amend the corporation's foundational documents to make the Chinese-American Planning Council ("CPC") the sole member of plaintiff. The CPC is a philanthropic organization active in New York City's Chinese community. It was the driving force behind the creation of the plaintiff in 1984.

Mo called a membership meeting for December 17 2007, at 6 o'clock, at 50 Norfolk Street in Manhattan. One of the stated purposes of the meeting was the election of the board of directors. The complaint avers that an exact location for the meeting was not specified in the notice. At the appointed hour, Hong and other members waited near the entrance of the building. They allege that they had not seen Mo or the other members enter the building and so assumed that the meeting had not begun. In fact, Mo and other members had convened in a conference room at the building. The meeting was called to order promptly at 6 pm and by 6:03 the assembled members, some carrying proxies, had elected a new board consisting of five members.¹ The persons elected to the board were John Chang, Thomas Tam, Eddie Mo, Dr. Herbert Kee and Flora Si

Soon thereafter, certain members found their way to the conference room, and discovered that the meeting was underway and that an election had already been completed. These members contacted Hong and his allies, who made their way to the conference room. The two factions disputed the legitimacy of the election and dealt with other corporate business. The meeting was adjourned at 6:13.

The next day, Hong and several members allied with him wrote

¹Both the 2004 and 2007 elections concerned the election of five directors. Elsewhere in the parties' papers there is discussion of a nine member board, which the disputed board voted to extend to thirteen. This discrepancy in the number of board members is not explained in the parties' papers.

a letter to Mo asserting that the election was null and void.

In the subsequent months, the newly elected board convened several times to conduct corporate business, including the addition of members and the expansion of the board from nine to thirteen. The new board also voted to make the CPC the sole member of plaintiff.

Hong and his allies brought a lawsuit challenging the election on January 28, 2008. The case was assigned to Justice Madden. The disputed board voted to approve \$50,000 in counsel fees to defend the legitimacy of the election. It approved the retention of the law firm Fabiani Cohen & Hall ("the Fabiani firm") for that purpose.

Justice Madden invalidated the December 17 election in a decision dated May 19, 2008.² She ordered a new election pursuant to Not-for-Profit-Corporation Law § 618. Justice Madden expressed scepticism at the brevity of the December 17th election. She noted that the two factions had "sharp disagreements" about the corporation's future and she found that the Mo faction had intentionally held the election before the Hong faction could get to the meeting in order to retain control of the corporation.

The Mo faction thereupon instructed the Fabiani firm to move to renew and reargue Justice Madden's decision. That motion was denied.

Plaintiff challenges the defendants' collective decision to

²Hong v 384 Grand Street Housing, Index No. 101607/08.

expend corporate funds in an ultimately unsuccessful defense of the disputed election. Plaintiff avers that the individual defendants expended the funds improperly to "defend their own personal election to the Board of Directors."³ The total amount ultimately paid the Fabiani firm was \$51,352.03. Plaintiff seeks to have the defendants repay this amount to the corporation.

Plaintiff has not sued all the members that participated in that election. It has also not named all the directors that were elected on December 17, 2007. John Chang and Thomas Tam are omitted as parties defendant. The complaint also does not name at least one board member, David Chen, who voted in favor of hiring the Fabiani firm. Plaintiff gives no clear explanation as to why the named individual defendants are more culpable than the unnamed directors and regular members who voted in favor of expending counsel fees in defense of the disputed election.

DISCUSSION

The complaint alleges two causes of action that are not clearly differentiated. The first cause of action alleges that defendants engaged in gross negligence and acted in bad faith in approving the legal fees and that these actions violated section 717 "and/or 720" of the New York Not-for-Profit Corporations Law. The second cause of action alleges that expenditure of legal fees

³Affidavit of Donald Hong, dated August 20, 2014, ¶ 53.

constituted a breach of fiduciary duty and corporate waste.

Section 717 of the Not-For-Profit Corporation Law concerns the duties of directors. It mandates that directors and officers shall discharge their positions "in good faith and with the care an ordinarily prudent person in a like position would exercise under certain circumstances." It also provides that directors may rely upon the advice of various professionals, including legal counsel, in taking action "so long as in so relying they shall be acting in good faith and with the degree of care [specified in § 717]." Plaintiff's papers do not address the applicability of Not-For-Profit Corporation Law § 720.

Plaintiff argues that defendants had no good faith basis for spending money for counsel fees defending the election. It points out correctly that Justice Madden found the election was flawed. However, this assertion relies on hindsight. While this court agrees with Justice Madden's reasoning, another Judge might have viewed the parties' respective positions differently. Defendants point out that they relied on the advice of counsel in defending the lawsuit, as contemplated by Not-For-Profit Corporation Law § 717. The decision of the Mo faction to defend the election was analogous to a corporate proxy fight, where the losing faction may expend corporate funds in an ultimately unsuccessful attempt to retain power at an election. (See Rosenfeld v Fairchild Engine and Airplane Corporation, 309 NY 168.) Additionally, Mo was president

prior to the disputed election. A Corporation's president generally retains discretion to commence litigation. (E.g. Fischer v Maloney, 43 NY2d 553.)

Plaintiff asserts that defendants were acting only in their own interest and a desire to take over the corporation. However, as seen in the record before the court and as acknowledged in Justice Madden's decision, the parties' dispute was about sharp policy differences concerning the direction of the corporation, and not simply about the aggrandizement of power.

For similar reasons, petitioner's breach of fiduciary duty claim fails. To establish breach of fiduciary duty, plaintiff must demonstrate the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that parties' misconduct. (Pokoik v Pokoik, 115 AD3d 428.) Here, defendants' actions did not rise to misconduct. They expended attorneys' fees to defend an election. While the election was ultimately voided, the defendants proceeded on the advice of counsel and with a good faith understanding that they had a colorable cause of action.

The essence of a waste claim is the diversion of corporate assets for improper or unnecessary purposes for personal gain. (SantiEstaban v Crowder, 92 AD3d 544.) Here defendants had no personal interest in the challenged payments to the Fabiani firm and there is no allegation that any of them had a financial interest in remaining on the board. Accordingly, plaintiff's claim

of waste of corporate assets fails. (See Shapiro v Rockville Country Club, Inc., 22 AD3d 657, ly denied 6 NY3d 705.)¹

DISCUSSION

For the reasons stated, defendants' motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. The clerk shall enter judgment dismissing the complaint.

DATED: February 2, 2015



J.S.C.

PETER H. MOULTON
J.S.C.

⁴In light of the holding above, it is not necessary to explore an additional ground for granting the motion: that not all the directors who voted for the expenditure of counsel fees are parties to this action. David Chen is omitted from the complaint. As plaintiff's complaint avers ultra vires board action, it would appear that all the board members who took part in the challenged action are necessary parties. (CPLR 1001, 1003.) The plaintiff offers no information concerning why Chen is any less responsible than the named board members.