Glaubach v Slifkin
2015 NY Slip Op 32478(U)
December 7, 2015
Supreme Court, Queens County
Docket Number: 702987/2015
Judge: Marguerite A. Grays

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

FELIX GLAUBACH, derivatively on behalf of PERSONAL TOUCH HOLDING CORP.,

Plaintiff(s)

-against-

DAVID SLIFKIN, TRUDY BALK, ROBERT MARX, JOHN L. MISCIONE, JOHN D. CALABRO, LAWRENCE J. WALDMAN, ROBERT E. GOFF, JACK BILANCIA, ANTHONY CASTIGLIONE, NANCY ROA, and JOSEPHINE DIMAGGIO.

Defendant(s)

Index Number 702987 2015

Motion Date September 3, 2015

Motion Cal. Number 67

Motion Seq. No. 3

The following papers numbered 1 to 8 read on this motion by defendant David Slifkin and defendant Trudy Balk for an Order pursuant to CPLR §3211(a)(1) and (7) dismissing the first, second, third, fourth, tenth, and eleventh causes of action in the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5
Memoranda of Law	6-8

Upon the foregoing papers it is ordered that the motion is denied.

Plaintiff Felix Glaubach and defendant Robert Marx established a health care business known as Personal Touch in 1974. Personal Touch provides home health care services, including care by home health aides, social services, and physical therapy. Glaubach served as the President of the Company and Chief Executive Officer until 2011. Defendant David Slifkin, a 4.5% shareholder in the company, became the Chief Executive Officer in 2011.

Marx serves as the Executive Vice-President, General Counsel, and Special Director of the company. Personal Touch did business through over twenty-five S corporations having their own separate articles of incorporation and by-laws.

The complaint alleges that from 2008 to 2011, a period during which Glaubach was incapacitated, Slifkin caused Personal Touch to pay himself undeclared and undisclosed income in excess of $500,000 and that he hid this unauthorized income by classifying it as the reimbursement of educational expenses which he never actually incurred. Slifkin also allegedly caused Personal Touch to pay unauthorized income to defendant Trudy Balk (the Vice-President of Operations), Marx, and others, which he allegedly disguised as reimbursement for educational expenses. Among the others allegedly receiving unauthorized income falsely classified as reimbursement for educational expenses were defendant Anthony Castiglione (Vice-President and Treasurer) who received at least $88,968, defendant Jack Bilancia who received at least $70,000, defendant Nancy Roa (Director of Human Resources) who received at least $17,500, and defendant Josephine DiMaggio (Executive Assistant) who received at least $10,000. The complaint further alleges that Marx, Slifkin, and Balk have conspired to freeze Glaubach out of company affairs.

The Court notes initially that the plaintiff cross moved in this action for an Order permitting him to serve a supplemental summons and an amended complaint, and that the cross-motion has been granted (*see*, the Court's decision and order [one paper] rendered on the companion motion (sequence #4) by defendant Robert Marx). Although the plaintiff served his cross motion in response to CPLR 3211 dismissal motions directed toward the original complaint, the instant motion by defendant Slifkin and defendant Balk may still be determined. " The filing of an amended pleading does not automatically abate a motion to dismiss that was addressed to the original pleading; the moving party has the option to decide whether its motion should be applied to the new pleading." (*Sage Realty Corp. v. Proskauer Rose LLP*, 251 AD2d 35; *see, Sobel v. Ansanelli,* 98 AD3d 1020; *49 West 12 Tenants Corp. v. Seidenberg*, 6 AD3d 243). In the case at bar, defendant Slifkin and defendant Balk did not withdraw their CPLR §3211(a) motion, and the Court will apply it to the amended complaint.

The Court also notes that under New York law, issues concerning the internal affairs of a corporation are decided in accordance with the law of the state of incorporation (*see*, *Hart v. Gen. Motors Corp.*, 129 AD2d 179) ."The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders – because otherwise a corporation could be faced with conflicting demands." *(Edgar* v. MITE Corp., 457 US 624, 645; *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 AD3d 422).

The first, second, third, and fourth causes of action concern the allegedly unauthorized income defendant Slifkin paid to himself and to other defendants. The tenth cause of action alleges that Slifkin and Balk breached their fiduciary duties to the company " by getting employees to make sexual harassment complaints against Glaubach." The eleventh cause of action alleges that defendant Slifkin's and defendant Marx's " ultra vires acts of barring Glaubach from Personal Touch's office constitutes a breach of their fiduciary duty."

The first, second, third, and fourth causes need not be dismissed on the ground that while plaintiff Glaubach brought a derivative action on behalf of Personal Touch Holding Corp., the allegedly unauthorized payments to Slikfin and Balk were made by an S corporation, Personal Touch Home Care of NY, Inc. The defendants' argument lacks merit because of the "double derivative " rule. "Any discussion of a double derivative action must be with reference to the baseline standard derivative action. To illustrate, in a standard derivative action, a shareholder brings a lawsuit asserting a claim belonging to a corporate entity in which the shareholder owns shares (corporation A). A double derivative action, in contrast, involves two entities: corporation A (the corporation whose claim is being asserted), and corporation B, which owns or controls corporation A." (*Lambrecht v. O'Neal*, 3 AD3d 277, 281 [Del. 2010]). "[A] double derivative suit is one brought by a shareholder of a parent corporation to enforce a claim belonging to a subsidiary that is either wholly owned or majority controlled. Normally, such a claim is one that only the parent corporation, acting through its board of directors, is empowered to enforce. Cases may arise, however, where the parent corporation's board is shown to be incapable of making an impartial business judgment regarding whether to assert the subsidiary's claim. In those cases a shareholder of the parent will be permitted to enforce that claim on the parent corporation's behalf, that is, double derivatively." (*Lambrecht v. O'Neal*, *supra*, 282). Glaubach, a shareholder of Personal Touch Holding Corp., may bring a double derivative action to enforce a claim belonging to the S corporation.

The causes of action asserted against defendant Slifkin and defendant Balk need not be dismissed on the ground that the plaintiff did not make a proper demand on the board to take action before asserting his claims derivatively. Under both New York law (*see*, BCL § 626; *Taylor v. Wynkoop*, 132 AD3d 843) and Delaware law (*see*,. Del. Ch. Ct. R 23.1; *Int'l Painters v. Cantor Fitzgerald, L.P.*, 132 AD3d 470; *In re Citigroup Inc. S'holder Derivative Litig.*, 964 AD2d 106), in general, Glaubach was required to make a demand upon the board that it take action to remedy the wrongs that are the subject of the causes of action asserted derivatively against defendants Slifkin and Balk. While Delaware law applies to this issue (*see*, *Int'l Painters v. Cantor Fitzgerald, L.P.*, 132 AD3d 470; *Lerner v. Prince*, *supra*), under both New York and Delaware law, paragraph twenty of the amended complaint adequately alleges that he made a demand upon the board to take action concerning the allegedly bogus educational expenses. In regard to the tenth cause of action, paragraph 20(c)(ii) of the

amended complaint adequately alleges that Glaubach wanted the allegedly false accusations of sexual harassment to be taken up by the board. In regard to the eleventh cause of action, the amended complaint read as a whole adequately alleges facts which show that a demand upon the board would have been an exercise in futility (*see*, *Int'l Painters v. Cantor Fitzgerald, L.P.*, *supra*; *Ocelot Capital Mgmt., LLC v. Hershkovitz*, 90 AD3d 464). In any event, the first, second, third, fourth, tenth, and eleventh causes of action are also asserted pursuant to BCL §720, and Glaubach did not have to make a demand upon the board before asserting claims under that statute (*see*, *Tsoukas v. Tsoukas,* 125 AD3d 872*; Conant v. Schnall*, 33 AD2d 326). BCL §720 is applicable to the causes of action, even though the claims are asserted against officers and directors of a foreign corporation (*see*, *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC,* 118 AD3d 422 423 [" To the extent plaintiffs allege violations of BCL § 720 (e.g. waste and unlawful conveyance), which is made applicable to foreign corporations doing business in New York by BCL § 1317(a)(2), those claims are also governed by New York law***."]).

The causes of action asserted against defendants Slifkin and Balk need not be dismissed on the ground that the board's decision not to file suit is protected by the business judgment rule. Delaware General Corporate Law §102, "Contents of Certificate of Incorporation," provides in relevant part that a certificate of incorporation may contain "(b) ***(7). A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit ***." Defendant Slifkin and defendant Balk are not entitled to the dismissal of the causes of action asserted against them pursuant to section 102(b) and Personal Touch's certificate of incorporation which follows the statute because, on the present state of the record, there are issues of fact pertaining to, *inter alia*, whether the board acted in good faith in refusing to file suit.

The motion by defendant Slifkin and defendant Balk is thus denied in its entirety.

Dated: DEC 07 2015

J.S.C.