

Guzman v Kordonsky
2016 NY Slip Op 31208(U)
June 27, 2016
Supreme Court, Kings County
Docket Number: 512059/2015
Judge: Sylvia G. Ash
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At an IAS Term, Part Com 11 of the
Supreme Court of the State of New York,
held in and for the County of Kings, at the
Courthouse, at Civic Center, Brooklyn,
New York, on the 20th of June, 2016.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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**YAKOV GUZMAN, PAUL TSATSKIN AND IGOR
TSATSKIN, derivatively as shareholders of Dial Car,
Inc. and in the right of and on behalf of Dial Car, Inc.,**

Plaintiffs,

- against -

DECISION / ORDER

Index No. 512059/2015

**MICHAEL KORDONSKY, individually and as
President and Chairman of the Board of Directors of
Dial Car, Inc., JEFFREY GOLDBERG, individually
and as Vice President and a Member of the Board of
Directors of Directors of Dial, Car, Inc., ALEX SULAVA,
individually and as Treasurer and Member of the
Board of Directors of Dial Car, Inc., MICHAEL
LEVIN, individually and as Secretary and Member of
the Board of Directors of Dial Car, Inc., DAVID
GOLDSTEIN, individually an das Grievance Chairman
and a Member of the Board of Directors of Dial Car,
Inc., SERGE KVVYAT, individually and a Board
Member At Large of Dial Car, Inc., TOMAR HAIM,
Individually and a Board Member At Large of Dial
Car, Inc., ALEX REYF, individually and as
Ombudsman of Dial Car, Inc.,**

Defendants.

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The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

1 - 3

Opposing Affidavits (Affirmations)_____

4 - 5

Reply Affidavits (Affirmations)_____

Defendants, Michael Kordonsky, Jeffery Goldberg, Alex Sulava, Micheal Levin, David Goldstein, Serge Kvyat, Tomar Haim and Alex Reuf (collectively “Defendants” or “the Board”), move to dismiss Plaintiffs’ complaint on the following grounds: (1) failure to comply with the demand requirement of BCL § 626; (2) failure to comply with the particularity requirements of CPLR §§ 3013 and 3016(b); and (3) for an award of costs and attorneys’ fees. Defendants also move to stay discovery. Nominal Defendant, Dial Car, Inc. (“Dial”), joins in Defendants’ motion to dismiss. Plaintiffs, Yakov Guzman, Paul Tsatskin and Igor Tsatskin (collectively “Plaintiffs”) oppose. For the reasons set forth below, Defendants and Dial’s motions to dismiss are GRANTED. Defendants’ request of costs and attorney’s fees is DENIED.

Background

Plaintiffs, shareholders of Dial, commenced the instant action to recover damages and remove Defendants as officers and directors of Dial, a corporation based in Brooklyn, New York. According to Plaintiffs, Dial is a “black car” car service company that provides ground transportation to corporate clients on a voucher basis. In addition to being shareholders, Plaintiffs are also Dial drivers. The cars used by Dial drivers are “radio-dispatched” cars, each with its own radio systems. Drivers obtain their shares by purchasing the rights and obligations attached to a radio number issued by Dial or one of its subsidiaries. In bringing the instant action, Plaintiffs claim that individual defendant, Michael Kordonsky (Kordonsky), as President and Chairman of Dial, breached his fiduciary duties and abused his position. Further, Plaintiffs claim that the Board aided and abetted Kordonsky in his misconduct.

In their complaint, Plaintiffs allege that Kordonsky and the Board wasted Dial’s assets by paying for unnecessary personal expenses, such as: extravagant meals for board meetings; leasing luxury vehicles for Kordonsky and Jeffery Goldberg (Goldberg), Vice President of the Board; and permitting Kordonsky and Goldberg to use Dial’s credit cards unrestrained. Plaintiffs claim that Kordonsky and the Board looted \$2 million from a Voucher Saving Program for Dial’s shareholders. Additionally, Plaintiffs claim that Kordonsky and the Board pocketed \$1.2 million from mortgaging Dial’s headquarters.

Kordonsky and the Board, Plaintiffs further claim, prohibited shareholders from selling their radios unless shareholders entered into an agreement with Kordonsky. Furthermore, Plaintiffs claim that Kordonsky and the Board disclosed confidential information to Dial’s competitors and destroyed Dial’s business records

to conceal their misconduct.

In moving to dismiss Plaintiffs' complaint, Defendants argue that Plaintiffs failed to follow the dictates of BCL § 626. Namely, Plaintiffs were required to make a demand of the Board to commence the instant action on Dial's behalf. BCL § 626 excuses failure to make a demand if it would be futile. According to Defendants, Plaintiffs have not shown that a demand on the Board would have been futile. Defendants argue that Plaintiffs have not demonstrated that a majority of the Board were interested in the alleged transactions. Or that a majority of the Board were controlled by Kordonsky.

Additionally, Defendants argue that Plaintiffs have not satisfy the requirements of CPLR §§ 3013 and 3016(b) with respect to their claims for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty. Those statutes require a plaintiff to plead breach of fiduciary duty claims with particularity. Defendants argue that Plaintiffs have not pled their claims with sufficient particularity. In opposition, Plaintiffs argue that their failure to comply BCL § 626 should be excused because the Board was either interested in the alleged transactions or under Kordonsky's control. Additionally, Plaintiffs argue that their breach of fiduciary claims satisfy the requirements CPLR §§ 3013 and 3016(b).

Discussion

Pursuant to BCL § 626 (c), in order to assert a derivative cause of action, shareholders must "set forth with particularity [their] efforts . . . to secure the initiation of such action by the board or the reasons for not making such effort" (see *Malkinzon v Kordonsky*, 56 AD3d 734, 735 [2d Dept 2008]; *Lewis v Akers*, 227 AD2d 595, 596 [2d Dept 1996]). Here, Plaintiffs conceded that they did not make a request upon the Board to commence the instant action. As such, the Court must determine whether Plaintiffs' failure to make a demand on the Board would have been futile and therefore should be excused.

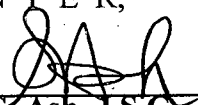
Demand is futile, and excused, when the directors are incapable of making an impartial decision as to whether to bring suit (*Bansbach v Zinn*, 1 NY3d 1, 9 [2003]). A plaintiff may satisfy this standard by alleging with particularity that a majority of the board of directors is interested in the challenged transaction or is "controlled" by a self-interested director (*Marx v Akers*, 88 NY2d 189 [1996]). It is not sufficient to merely name a majority of the directors as defendants with conclusory allegations of wrongdoing or control by wrongdoers (see *Glatzer v Grossman*, 47 AD3d 676, 677 [2d Dept 2008]).

Here, Plaintiffs' complaint identifies only Kordonsky and Goldberg as being interested in the challenged transactions, not a majority of the Board. Further, Plaintiffs fail to allege, with particularity, that

a majority of the Board were under Kordonsky's or Goldberg's control. As such, Plaintiffs have not demonstrated that a demand on the Board would have been futile. Therefore, Defendants and Dial's motions to dismiss are GRANTED, rendering the motion to stay discovery moot. Defendants' request of costs and attorney's fees is DENIED.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.