Guzman v Kordonsky
2016 NY Slip Op 32255(U)
November 7, 2016
Supreme Court, Kings County
Docket Number: 512059/2015
Judge: Sylvia G. Ash

At an IAS Term, 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 7th of November 2016.

PRESENT:

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 -

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 Dial Car, Inc., ALEX SULAVA, Individually and as Treasurer and a Member of the Board of Directors of Dial Car, Inc., MICHAEL LEVIN, individually and as Secretary and a Member of the Board of Directors of Dial Car, Inc., DAVID GOLDSTEIN, individually and as Grievance Chairman and a Member of the Board of Directors of Dial Car, Inc., SERGE KVYAT, individually and a Board Member At Large of Dial Car, Inc., TOMAR HAIM, Car, Inc., ALEX REYF, individually and as Ombudsman of Dial Car, Inc.,

Defendants.

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Decision / Order

Index No. 512059/2015

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
Opposing Affidavits (Affirmations)	2 - 3
Reply Affidavits (Affirmations)	

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Plaintiffs, Yakov Guzman, Paul Tsatskin and Igor Tsatskin move pursuant CPLR §2221 to reargue this Court's Decision and Order dated June 20, 2016, dismissing Plaintiffs complaint. Alternatively, Plaintiffs seek leave, pursuant to CPLR §§3211(e) and 3025(b), to replead and amend their complaint. Defendants, Michael Kordonsky et al., and Nominal Defendant, Dial Car Inc. ("Dial"), oppose. For the reasons set forth below, Plaintiffs' motion to reargue is DENIED. However, Plaintiffs' application to replead and amend their complaint is GRANTED.

Background

Plaintiffs, shareholders of Dial, commenced this shareholders derivative action and sought, among other relief, damages for alleged misconduct on the part of members of Dial's Board of Directors (the "Board"). In their complaint, Plaintiffs alleged that Michael Kordonsky ("Kordonsky"), President and Chairman of the Board, with assistance from other members of the Board, breached his fiduciary duties. The purported breach encompassed, among other allegations, mismanaging or misappropriating millions of dollars in funds from a mortgage taken out on Dial's headquarters; misappropriating funds of a savings program for Dial's shareholders; unlawfully restricting shareholders from selling their shares; and engaging in self-dealing.

Elaborating further, Plaintiffs claimed that Kordonsky and the Board wasted Dial's assets in paying for extravagant meals for board meetings, in leasing luxury vehicles for Kordonsky and the Vice Chairman of the Board, Jeffery Goldberg ("Goldberg"). Further, Plaintiffs alleged that Kordonsky and Goldberg used Dial's credit cards liberally and unrestrained. And that Kordonsky and the Board disclosed confidential information to Dial's competitors, while also destroying Dial's business records as a means of concealing their wrongdoings.

On December 4, 2015, both Defendants and Dial moved to dismissed Plaintiffs' complaint, arguing, among other things, that Plaintiffs failed to follow the dictates of BLC §626. That statute, Defendants and Dial argued, required Plaintiffs to make a demand upon the Board to sue on Dial's behalf before commencing their shareholders derivative action. Defendants and Dial maintained that Plaintiffs failed to establish that a demand on the Board would have been futile. In a Decision and Order dated June 20, 2016, this Court granted Defendants' and Dial's motion and dismissed Plaintiffs' complaint. In its Order, this Court determined that Plaintiffs failed to establish that a demand on the Board would have been futile. This Court found that Plaintiffs had not shown that a majority of the Board, excepting Kordonsky and Goldberg, were interested in the challenged transactions. And that Plaintiffs had not alleged sufficient facts to demonstrate that the Board was under Kordonsky's or Goldberg's control.

Plaintiffs now move to reargue this Court's order, insisting that the Court applied an overly strict pleading standard in finding the absence of demand futility. Plaintiffs maintain that their complaint identified the entire Board, not just Kordonsky and Goldberg, as being interested in the challenged transactions. Further, Plaintiffs argue that the complaint sufficiently established Kordonsky's and Goldberg's control of the Board. Plaintiffs point to, among other allegations, the Board's approval of Kordonsky's and Goldberg's liberal and unrestrained use of Dial's credit cards.

In the alternative, Plaintiffs seek leave to amend their complaint. In the proposed amended complaint, Plaintiffs cite Alex Sulava, Michael Levin, David Goldstein, Serge Kvyat, Tomar Haim

and Alex Reyf (collectively the "remaining members") as being interested in the challenged transactions. Plaintiffs claim, among other things, that the remaining members obtained their positions on the Board by agreeing to "rubber stamp" Kordonsky's and Goldberg's misconduct. That Kordonsky and Goldberg asserted control over the remaining members through enticements and rewards of positions within Dial. Further, Kordonsky and Goldberg allegedly shared ill-gotten Dial funds with the remaining members and issued threats as a means of suppressing dissent.

Both Defendants and Dial oppose Plaintiffs' motion to reargue or to replead and amend the complaint. Defendants and Dial maintain that Plaintiffs have not demonstrated that the Court overlooked or misapprehended issues of facts or law in the prior motion. Further, Defendants argue that Plaintiffs were required to make a demand upon a newly constituted Dial Board before filing the amended complaint. According to Defendants, three members of the seven-member Dial board, including Kordonsky and Goldberg, have been removed since the commencement of this action. Lastly, Defendants and Dial argue that Plaintiffs' motion should be denied because the allegations in the amended complaint are insufficient to establish demand futility.

Discussion

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR § 2221[d][2]; *see Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]). The determination to grant leave to reargue a motion lies within the sound discretion of the court (*Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]). Here, Plaintiffs have not demonstrated that the Court overlooked or misapprehended matters of fact or law in the prior motion. Rather, Plaintiffs merely repeat arguments that were previously considered by the Court. Therefore, Plaintiffs' motion to reargue is DENIED.

Turning to Plaintiffs' application to amend their complaint, the law is well settled that applications for leave to amend pleadings should be freely granted except when the delay in seeking leave to amend would directly cause undue prejudice or surprise to the opposing party, or when the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025 [b]; *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008]). Here, Plaintiffs' proposed amendments are not prejudicial, nor do they come as a surprise to Defendants and Dial. Thus, the Court will consider whether the amendments are palpably deficient or devoid of merit.

Pursuant to BLC § 626 (c), in order to assert a derivative cause of action, in their complaint, 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 did not make a demand upon the Board, thus Plaintiffs are required to plead facts demonstrating that a demand would have been futile.

Demand is considered futile when directors are incapable of making an impartial decision as to whether to bring suit (*Bansbach v Zinn*, 1 NY3d 1, 9 [2003]; *see Malkinzon v Kordonsky*, 56 AD3d at 735; *Danzy v NIA Abstract Corp.*, 40 AD3d 804, 805 [2d Dept 2007]). A plaintiff may

satisfy this standard by alleging with particularity (1) that a majority of the board of directors is interested in the challenged transaction or controlled by a self-interested director, (2) that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances, or (3) that 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 v Akers*, 88 NY2d 189, 200-201 [1996]).

Here, Plaintiffs' amended complaint alleges that the additional members obtained their positions on the Board by acquiescing to Kordonsky and Goldberg's alleged misconduct. Further, the amended complaint alleges that Kordonsky and Goldberg awarded the additional members for their obedience with ill-gotten funds and positions within Dial. Additionally, Plaintiffs allege that Kordonsky and Goldberg issued threats and punishment against Board members, as a means of suppressing dissent. Those allegations are sufficiently particular to demonstrate that the additional members were interested in the challenged transactions or were controlled by Kordonsky and Goldberg. Defendants contention that Plaintiffs were required to make a demand upon the newly constituted board before filing the amended complaint is misplaced. Only a minority, three members, of the seven-member Board have been replaced. As such, a demand upon the new board would still be considered futile because four members, a majority, are alleged to have been interested in the challenged transactions. Therefore, Plaintiffs' motion to replead and amend their complaint is GRANTED.

This constitutes the Decision and Order of the Court.

ENTER,

Sylvia G. Ash, J.S.C.

HON. SYLVIA G. ASH, JSC