

Seldat Distrib., Inc. v TranScan Sys., Inc.
2019 NY Slip Op 32559(U)
August 15, 2019
Supreme Court, Kings County
Docket Number: 520228/2018
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8

-----X
Seldat Distribution, Inc.,

Plaintiff,

- against -

TranScan Systems, Inc. and Joseph Frasko,

Defendants.
-----X

Amended
Decision and order

Index No.: 520228/2018

ms # 2 & 3
August 15, 2019

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a decision and order dated April 1, 2019. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior order the plaintiff and defendant entered into a stock subscription agreement whereby the plaintiff agreed to pay \$2 million in exchange for 4,565,631 shares of defendant corporation. The plaintiff paid \$1.5 and was thereby entitled to 3,424,223 shares. The shares were never delivered to the plaintiff and according to the complaint the plaintiff was never permitted access to examine the books and records of defendant corporation. The plaintiff instituted the within lawsuit alleging various causes of action including that the defendant never filed an amendment to its Certificate of Incorporation authorizing the shares to which plaintiff is entitled. After the Summons and Complaint was filed the defendant delivered to plaintiff the requisite shares including information they had properly filed all necessary paperwork to authorize those shares. The defendants then moved seeking to dismiss the complaint on the grounds all the allegations were now moot since the stock shares had been transferred to the

plaintiff. The court granted the motion to dismiss holding, essentially, that the plaintiff had not presented any evidence they were harmed by the failure to deliver the shares in a timely manner.

The plaintiff has now filed the instant motion to reargue. The plaintiff asserts the court made various legal errors concluding the plaintiff suffered no harm by the failure to deliver the shares. The defendant opposes and maintains no such errors were made by the court.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

The original opposition to the motion to dismiss only focused upon two factors, namely that the failure to deliver the shares prevented the plaintiff from examining the books and records of the corporation and that the failure to deliver the shares prevented the plaintiff from influencing board action or from selling the shares in an attempt to salvage the investment. Those arguments were presented to support the notion there was evidence there were viable breach of contract claims. The court rejected those arguments concluding the plaintiff had not been damaged in any way since the plaintiff had no right to preserve the value of its investment. Upon reargument the plaintiff asserts the court erred by concluding the failure to deliver the shares of stock did not cause any damage. The plaintiff argues there were four distinct areas of damage including the inability to inspect the books and records of the defendant, the inability to receive distributions, the inability to participate in pro rata stock issuances and the inability to sell, pledge or otherwise dispose of defendant's stock. First, any alleged damages resulting from the inability to receive distributions or stock issuances were not argued in the prior motion and may not be raised in this motion to reargue. In any event there were no allegations in the

complaint that such distribution existed or such stock issuances were available and that the plaintiff was foreclosed from participation due to the lack of shares. Thus, that portion of the motion to reargue is denied.

Concerning the alleged damages caused by the plaintiff's inability to sell the shares, the plaintiff argues even though the shares were restricted they could have been sold pursuant to Section 4(a)(7) of the Securities Act (15 USC §77d(a)(1) & (7)) which permits the sale of restricted securities upon the satisfaction of certain conditions. The defendant argues that the complaint does not allege any desire or ability to sell the stock. The defendant further argues the plaintiff could not have satisfied the requirements to sell the stock under the above noted provisions and that the complaint does not allege otherwise. The plaintiff has failed to present any evidence it had the ability to sell the shares as argued. The plaintiff argues in a conclusory manner that "Seldat had every expectation and right that it would receive stock eligible for resale under Section 4(a)(1) and (7) of the Securities Act" (see, Memorandum of Law in Support of Motion, page 6). However, the plaintiff did not even minimally demonstrate how it could possibly sell the shares and satisfy the numerous conditions of 17 CFR §230.144 which exempts certain stock from registration requirements. In reply the plaintiff argues that "at the pleading stage, it is inappropriate to determine whether Seldat was or was not able to resell the restricted stock into the public markets or otherwise...rendering TranScan's extended and speculative discussion of the securities laws moot at best" (see, Reply Memorandum, pages 7,8). It may be true that an extended foray into the sale of restricted securities is not appropriate in a motion to dismiss, however, without a demonstration of the ability to sell the shares the plaintiff suffered no damages by not receiving them in a timely manner. Thus, the ability to sell the shares is vital to the breach of contract claims. The plaintiff argues that "Seldat amply alleges that it was

deprived of \$1.5 million in Subscription funds (and the stock it intended to purchase) for over 30 months. This deprivation is manifestly a cognizable injury” (see, Reply Memorandum, page 7). However, the plaintiff does not sufficiently explain how the injury was cognizable, especially when the plaintiff has not demonstrated it would have benefitted by possession of the shares in any real way. Since, the plaintiff has failed to present any evidence they had the ability to sell the shares the plaintiff suffered no damage and consequently that portion of the motion to reargue is denied.

Lastly, the plaintiff seeks reargument on the grounds the court erred by holding the plaintiff was not damaged by the inability to inspect the books and records of the defendant. However, the plaintiff had every opportunity to examine the books and records and did not need the stock certificates to do so. The case cited by the plaintiff, Dynasty Building Corp., v. Ackerman, 376 N.J. Super., 280 [Superior Court of New Jersey Appellate Division 2005] does not demand a contrary result. That case deals with conversion actions resulting from attorney trust accounts and does not concern the specific question whether the failure to deliver shares creates a valid claim for damages. Since the plaintiff has failed to present any evidence in this regard the motion seeking to reargue is denied.

For similar reasons the motion seeking to reargue the dismissal of the conversion claim is denied. Without the demonstration of any injury the claim is improper.

It is true the original motion did not involve Frasko individually, therefore the motion seeking reargument to reinstate claims against defendant Joseph Frasko is granted. However, the cross-motion seeking to dismiss all claims against him is granted. There can be no claims against him when all such claims against TranScan have been dismissed.

Lastly, the plaintiff may move seeking to amend the complaint to add a claim for rescission. The court has no authority to deny a motion before it is made.

Therefore, the motion seeking to reargue is denied to the extent noted. The plaintiff may make a motion to amend the complaint.

So ordered.

ENTER



Dated: August 15, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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MIRIAM COURTNEY CLERK
FILED