

**D. Karnofsky, Inc. v Rozof**

2020 NY Slip Op 31748(U)

April 4, 2020

Supreme Court, New York County

Docket Number: 450427/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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D. KARNOFSKY, INC., MARK ROZOF, LINDA ROZOF-  
GUBER, AND JUDITH TEITELL, AS PARTNERS OF 392  
1ST STREEET COMPANY,

INDEX NO. 450427/2018

MOTION DATE 07/19/2019

MOTION SEQ. NO. 002

Plaintiffs,

- v -

ARTHUR ROZOF, INDIVIDUALLY AND AS EXECUTOR OF  
THE ESTATE OF EDNA ROZOF, DECEASED,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34,  
35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In motion sequence number 002, D. Karnofsky, Inc. (the Company), Mark Rozof,  
Linda Rozof-Guber and Judith Teitell (Counterclaim Defendants or the Siblings) move to  
dismiss the second, third, and fourth counterclaims of Arthur Rozof individually and as  
executor of the estate of Edna Rozof, deceased.

On a motion to dismiss counterclaims brought pursuant to CPLR 3211 (a) (7)

“the court must presume the facts pleaded to be true and must  
accord them every favorable inference. It is, however, also  
axiomatic that factual allegations which fail to state a viable  
cause of action, that consist of bare legal conclusions, or that  
are inherently incredible or unequivocally contradicted by  
documentary evidence, are not entitled to such consideration.”

(*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dep’t 2006] (citation omitted), Aff’d 9 NY3d 836  
[2007], cert denied 128 S Ct 1696 [2008].)

First, defendants challenge plaintiff's failure to allege pre-litigation demand. Plaintiffs who make pre-litigation demands but then file the complaint without giving the board a reasonable opportunity to investigate and respond to the demands do not satisfy the demand requirement. (*Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 139 AD3d 621, 622 [1st Dept 2016].) Here, Arthur sent his demand letter (Demand Letter) to Mark on November 17, 2017 (NYSCEF Doc No [NYSCEF] 36, Demand Letter) and Mark responded in an email (Response Email) on November 20, 2017 informing Arthur that the Board of Directors would consider the five claims of alleged misconduct after the annual shareholder meeting on December 15, 2017. (NYSCEF 37, November 20, 2017 E-mail.) Two days after receiving the Response Email, and five days after sending the Demand Letter, Arthur filed his counterclaims on November 22, 2017. (NYSCEF 5, Answer with Counterclaims.) Accordingly, Arthur did not give the board a reasonable opportunity to investigate and respond to the demands. The short timeline here makes the pre-suit demand appear perfunctory and, therefore, undermines the purpose of the demand requirement: "to weed out unnecessary or illegitimate shareholder derivative suits." (*Barr v Wackman*, 36 NY2d 371, 378 [1975].) Arthur's decision to send the Demand Letter after the complaint was filed against him and while his time to interpose an answer with counterclaims was running only bolsters this conclusion. (See NYSCEF 1, Complaint filed 9/13/17.)

The court rejects Arthur's argument that the terse response to the Demand Letter clearly demonstrated that the Company would do nothing more and would not initiate a civil action. Indeed, the Response Email says no such thing, and to the contrary, invites Arthur to submit the evidence of his allegations for the Board's consideration at the

meeting. (NYSCEF 37, November 20, 2017 E-mail.) Therefore, Arthur fails to show that the board refused to bring this action in its own name, another reason that the demand requirement was not satisfied.

The court rejects the Counterclaim Defendants' argument that Arthur cannot allege demand futility because he made a pre-suit demand. (*See Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 139 AD3d 621, 622 [1st Dep't 2016]) [noting that compliance with BCL § 626(c) may be found where the plaintiff alleges demand futility in spite of the plaintiff's pre-suit demand that fails to satisfy the demand requirement.] "[A] demand would be futile if a complaint alleges with particularity that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction." (*Marx v Akers*, 88 NY2d 189, 198 [1996].)

Regardless of whether the majority of director's are interested, Arthur's conclusory allegations that the compensation directors have set for themselves is excessive is insufficient. "A complaint challenging the excessiveness of director compensation must - to survive a dismissal motion - allege compensation rates excessive on their face or other facts which call into question whether the compensation was fair to the corporation when approved, the good faith of the directors setting those rates, or that the decision to set the compensation could not have been a product of valid business judgment." (*Marx*, 88 NY2d at 203-204.) Arthur has alleged none of these. Rather, he alleges that "upon information and belief, the Siblings have rendered no services to the Company during the relevant time period" (NYSCEF 35, Amended Answer with Counterclaims ¶ 116) and therefore "violated their fiduciary duty of loyalty

by taking excessive salaries and bonuses for themselves.” (*Id.* ¶¶ 187, 197.) These allegations are insufficient and without them, Arthur’s correlating theory of de facto unequal shareholder distributions fails. To the extent the Second, Third and Fourth Counterclaims are premised on these allegations, they fail.

The Second Counterclaim also fails for the independent reason that it does not distinguish between direct and derivative claims. (See *Abrams v Donati*, 66 NY2d 951, 953 [1985], *rearg denied*, 67 NY2d 758 [1986].) Indeed, the Second Counterclaim is a “confusing hodge-podge of ... personal claims [and] claims derivative in nature.” (*Barbour v Knecht*, 296 AD2d 218, 228 [1st Dept 2002].) Leave to replead is denied because the Second Counterclaim fails for multiple reasons.

Nevertheless, “[d]emand is excused because of futility when a complaint alleges with particularity that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances. (*Marx*, 88 NY2d at 200.) Here, the complaint is bereft of any particularized allegations that the board did not fully inform themselves in connection with the alleged deteriorating property. (NYSCEF 35, Amended Answer with Counterclaims ¶¶ 132-140.) To the contrary, Arthur alleges that the Counterclaim Defendants “claimed to have [repaired the back wall of the property at 312 East 6<sup>th</sup> Street] but have failed and refused to provide any engineer’s certification to that effect.” (*Id.* ¶ 135.) Moreover, Arthur alleges that “the Company has retained a contractor to make certain repairs ... but the repairs do not address the full extent of the damage and conditions that exist at the Buildings, including the Back Wall.” (*Id.* ¶ 137.) Accordingly, demand was not excused to redress the alleged wrongs concerning the deteriorating property.

Arthur however alleges particularized facts that the board did not fully inform themselves about the alleged illicit short-term rentals. (*Id.* ¶ 141.) “[A] director ‘does not exempt himself from liability by failing to do more than passively rubber-stamp the decisions of the active managers.’” (*Marx*, 88 NY2d at 200 (citations omitted).) Here, Arthur alleges that he “has brought the illicit short-term rentals to Mark’s attention on several occasions, but Mark has ignored Arthur.” (*NYSCEF 35*, Amended Answer with Counterclaims, ¶ 143.) “[A]s early as 2016, complaints were filed with the NYC Department of Buildings regarding the illegal use of apartments as hotel rooms at 312 and 315 East 6<sup>th</sup> Street.” (*Id.* ¶ 144.) Allegedly, “the previous superintendent has told Mark of the existence of an inordinate number of transient individuals entering and leaving the Buildings with luggage at the Buildings, evidencing the existence of short-term Airbnb rentals but Mark has ignored him.” (*Id.* ¶ 145.) Arthur further alleges that the Counterclaim Defendants “had the opportunity to review surveillance tapes from the Buildings to determine whether there were transient individuals with luggage entering and leaving the Buildings but ... failed and refused to do so.” (*Id.* ¶ 147.) Indeed, “on one occasion, one of the illegal Airbnb tenants apparently left one of the subject apartments without turning off the gas and the Fire Department had to be called to break down the door, resulting in damage to the premises.” (*Id.* ¶ 149.) These allegations are sufficient to show demand futility in connection with the claims premised on the illicit short-term rentals.

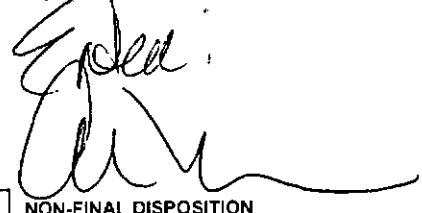
Accordingly, to the extent that the third and fourth counterclaims are premised on the allegations of the illicit short-term rentals, they are preserved.

The court has considered the balance of the parties’ arguments and they do not yield an alternative result.

Accordingly, it is

ORDERED that the motion to dismiss the counterclaims is granted and the second cause of action is dismissed without leave to replead.

4/4/2020  
DATE



CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE