

Hafeez v American Express Co.

2023 NY Slip Op 31273(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 656656/2022

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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TARIQ HAFEEZ		INDEX NO. <u>656656/2022</u>
Plaintiff,		MOTION DATE <u>12/26/2022</u>
- v -		MOTION SEQ. NO. <u>003</u>
AMERICAN EXPRESS COMPANY,		
Defendant.		DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for

DISMISS

In this action commenced by plaintiff Tariq Hafeez (plaintiff), as a shareholder of defendant American Express Company (defendant), seeks to inspect defendant's books and records. Defendant moves, pre-answer, to dismiss plaintiff's complaint for failing to comply with the requirements under CPLR 401-411 and New York Business Corporation Law (BCL) § 624(d). Plaintiff opposes.

Background

Defendant is a financial services company that primarily provides credit and charge products and is one of the world's largest issuers of payment cards (NYSCEF # 2 – complaint, ¶ 7). Plaintiff owns common shares of American Express stock (*id.*, ¶ 3). According to the complaint, beginning in March 2020, the Wall Street Journal (WSJ) published a series of articles reporting defendant's abusive practices in the sale of small business cards and consumer cards (*id.*, ¶¶ 13-28). In particular, the WSJ articles focused on a marketing campaign of defendant called Project Lincoln, which began in 2015 and centered on retaining customers after the end of defendant's exclusive credit-card partnership with Costco (*id.*). The WSJ articles detailed the improper sales tactics and raised red flags of defendant's mismanagement, which are incorporated in the complaint (*id.*). The complaint further alleges that the illicit sales practices continued even after Project Lincoln ended in 2016 (*id.*, ¶¶ 21-23).

Following the WSJ's reporting and investigation launched by several government agencies on defendant's use of aggressive and misleading card sales tactics, on May 3, 2021, plaintiff served defendant with a demand to inspect certain books and records for investigating defendant's potential consumer protection violations (*id.*, ¶¶ 28-29). The parties disputed the scope of defendant's production and were unable to resolve it through negotiations (*id.*, ¶¶ 32-38).

On June 8, 2022, plaintiff commenced this action by filing a summons and complaint, alleging that defendant has failed to make a complete production in response to his demand (NYSCEF #s 1-2). The complaint alleges two causes of action for inspection of records, one under BCL § 624 and the other under New York common law (complaint, ¶¶ 39-53).

Defendant moves to dismiss the complaint in its entirety based on procedural deficiencies, arguing that the complaint does not comply with CPLR 401-411 for failing to style plaintiff's demand as a petition and that the complaint also does not comply with BCL § 624 for failing to style this action as a summary proceeding through an order to show cause.

Plaintiff does not oppose the parts of defendant's motion attacking the procedural deficiencies in the BCL § 624 claim. Instead, plaintiff's opposition focuses on his common law claim, arguing that the court has jurisdiction under CPLR 301 to adjudicate the common law claim and, in accordance with CPLR 103, should deem the claim brought in a proper form to avoid dismissal. In addition, plaintiff argues that defendant has waived its opportunity to seek dismissal of plaintiff's common law claim on meritorious grounds in any subsequent motion.

In reply, defendant argues that plaintiff abandoned his BCL § 624 claim for failing to respond. Defendant also argues that since the common law claim is inextricably intertwined with the statutory claim, it must also be dismissed. Further, defendant contends that the court should not exercise jurisdiction over the common law claim to reward plaintiff's intentional disregard of judicial requirements. Defendant adds that as it has already provided all the responsive documents, to exercise jurisdiction in this case would waste judicial resources.

Discussion

The Statutory Claim Based on BCL § 624

As to plaintiff's statutory claim for inspection of books and records, defendant argues that, by filing a summons and complaint, plaintiff fails to comply with BCL § 624, which requires that the shareholder apply to the court seeking an order to show cause in a summary proceeding. Defendant contends that by way of an order to show cause, plaintiff would offer a memorandum of law in support of the petition

along with affidavits that defendant can properly respond to, as opposed to a complaint under which defendant has to accept the allegations as true (NYSCEF # 43, def's mem at 11, citing *Greenberg v Flaco Constr. Corp.*, 29 Misc 3d 1202[A] [Sup Ct, Kings County 2010] [dismissing the plaintiff's BCL § 624 claim without prejudice with leave to demand inspection since BCL § 624(d) requires that a demand for inspection be made by order to show cause]).

As defendant points out, moving by a proposed order to show cause is the appropriate procedure to demand inspection under BCL § 624 (BCL § 624[d] ["the person making the demand for inspection may apply to the supreme court ... for an order directing the corporation, its officer or agent to show cause why an order should not be granted permitting such inspection by the applicant"]; *see also Davis v CornerStone Tel. Co., LLC*, 19 Misc 3d 1142[A] [Sup Ct, Albany County 2008], *mod on other grounds* 61 AD3d 1315 [3d Dept 2009] [BCL § 624(d) "mandates that the application be brought by Order to Show Cause"]). Here, plaintiff does not dispute that his statutory claim is brought in an improper form, thereby waiving his opposition and abandoning this claim for inspection under BCL § 624 (*Saidin v Negron*, 136 AD3d 458, 459 [1st Dept 2016] [finding that plaintiff abandoned his claim for failing to oppose that part of the motion to dismiss against him]).

The Common Law Claim

Under New York law, shareholders have both statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid purpose (*Retirement Plan for Gen. Empls. of City of N. Miami Beach v McGraw-Hill Co., Inc.*, 120 AD3d 1052, 1055 [1st Dept 2014]). Since "the common-law right of inspection is broader than the statutory right," plaintiff is entitled to inspect records "beyond the specific materials delineated in Business Corporation Law § 624(b) and (e)" (*id.* at 1056). Accordingly, dismissing the BCL § 624 claim does not automatically lead to a dismissal of plaintiff's common law claim.

To the extent defendant argues that the common law claim is not styled in the proper form, it does not warrant dismissal. Under CPLR 103, "a civil proceeding shall not be dismissed solely because it was not brought in proper form, but the court shall make whatever order is required for its proper prosecution" (CPLR 103[c]; *see also Nationwide Mut. Ins. Co. v Hausen*, 143 AD2d 577, 580 [1st Dept 1988] ["the clear and stated intent of the CPLR is to bar dismissals of actions where the court has jurisdiction and only an error in form is present"]). In this connection, defendant's argument that the court does not have, or should not exercise, jurisdiction over this matter is also unavailing. Despite relying on CPLR 401-411 in the complaint, plaintiff also raises in his opposition that the court has jurisdiction under CPLR 301 to independently determine the common law claim. Notably, jurisdiction is an affirmative defense for the defendant to raise by motion or answer,

and plaintiff is allowed—when the defense is raised—to establish the court’s jurisdiction (see e.g. *Fishman v Pocono Ski Rental*, 82 AD2d 906, 907 [2d Dept 1981]).

Defendant additionally argues that the court should not exercise jurisdiction because defendant has provided all the responsive documents and any further litigation would be unnecessary and waste judicial resources. Yet, the issue of whether there exist additional responsive, non-privileged documents not produced by defendant was not briefed by the parties on the instant motion and will not be determined by the court at this junction. Accordingly, the part of the motion to dismiss plaintiff’s common law claim for inspection of records is denied. As this motion does not reach the merits of plaintiff’s claim, this decision and order does not amount to a judgment compelling defendant to produce the requested documents under common law.

Conclusion


In view of the above, it is

ORDERED that the branch of defendant’s motion to dismiss plaintiff’s first cause of action for inspection of records pursuant to BLC § 624 is granted; and it is further

ORDERED that the branch of defendant’s motion to dismiss on technical grounds plaintiff’s second cause of action for inspection of records pursuant to New York common law is denied; and it is further

ORDERED that defendant is to serve an answer to the complaint within 20 days of the entry of this order.

4/12/2023
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE