

Burden v General Elec. Co.

2023 NY Slip Op 32365(U)

July 11, 2023

Supreme Court, New York County

Docket Number: Index No. 652991/2021

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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| STEPHEN J. BURDEN, JACQUELINE S. BURDEN, and GAIL WALKOVER, | INDEX NO. <u>652991/2021</u> |
| Plaintiffs, | MOTION DATE _____ |
| - v - | MOTION SEQ. NO. <u>001</u> |
| GENERAL ELECTRIC COMPANY, | DECISION + ORDER ON MOTION |
| Defendant. | |

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 54, 55, 56, 57
were read on this motion to/for DISMISS.

In motion sequence number 001, defendant General Electric Company (GE), moves to dismiss the verified complaint wherein plaintiffs Stephen J. Burden, Jacqueline S. Burden, and Gail Walkover seek to inspect GE's books and records pursuant to Business Corporation Law § 624 and common law.

Factual and Procedural Background

Unless otherwise indicated, the following facts are taken from complaint, and for the purposes of the motion to dismiss, are accepted as true. The court also incorporates the procedural history of related state and federal actions, as set forth in court documents attached to GE's motion.

Plaintiffs are GE shareholders. (NYSCEF 1, Complaint ¶ 3.) GE is a New York corporation. (*Id.* ¶ 4.) In November of 2017, a class action was filed against GE and several GE executives, which was consolidated and coordinated with related cases (the

Securities Class Action). (*See Sjunde AP-Fonden v Gen. Elec. Co.*, 417 F Supp 3d

379, 389 [SD NY 2019].) On March 22, 2018, plaintiff Walkover sent a letter to GE's Board (the Board) demanding litigation and on November 14, 2018, Stephen J. Burden¹ did the same (the Litigation Demands). (*Id.* ¶¶ 6-7; NYSCEF 2, the Walkover Litigation Demand; NYSCEF 3, the Burden Litigation Demand.) The Litigation Demands were based on:

- “(a) review and analysis of public filings made by GE and other persons with the United States Securities and Exchange Commission [SEC];
- (b) review and analysis of press releases, financial statements, and other publications caused to be disseminated by GE;
- (c) review and analysis of news articles, shareholder communications, and postings on GE's website concerning the Company's public statements;
- (d) review and analysis of court filings in [the Securities Class Action]; and
- (e) review and analysis of other publicly available information concerning GE, that have indicated that the Board and GE's officers may have engaged in mismanagement and breached their fiduciary duties to the Company and its shareholders and therefore wrongly refused Plaintiffs' Litigation Demands.”

(*Id.* ¶ 8.)

On August 29, 2019, the Securities Class Action Judge denied, in part, GE's motion to dismiss “as to (1) Plaintiffs' Section 10(b) and Rule 10b-5 claims concerning (a) factoring in GE's 2016 Form 10-K and (b) GE's failure to disclose factoring in its Class Period financial statements, which survive against GE and Bornstein; and (2) for now, Plaintiffs' Section 20(a) claims against each Individual Defendant.” (*Sjunde AP-Fonden*, 417 F Supp 3d at 389; NYSCEF 1, Complaint ¶ 10.)

¹ Plaintiffs allege that this demand was made by “the Burdens” but the letter itself states that it is being sent on behalf of Stephen only, not Jacqueline. (NYSCEF 3, the Burden Litigation Demand.)

On December 9, 2020, the SEC released an Order Instituting Cease-And Desist Proceedings, Pursuant to Section 8A of the Securities Act Of 1933 And Section 21c Of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease and-Desist Order (the SEC Order), pursuant to which GE “reached a \$200 million settlement with the SEC for its alleged disclosure failures within GE Power and GE Capital” (NYSCEF 1, Complaint ¶¶ 16; see also NYSCEF 33, SEC Order.) Plaintiffs allege this settlement further supports their claims in the Litigation Demands that wrongdoing occurred. (*Id.*)

The court notes that two other GE shareholders filed complaints against GE in New York Supreme Court alleging that their demands were wrongfully refused. (*Priest v Immelt et al*, Index No. 655528/2020; *Tola v Immelt et al*, Index No. 656544/2020.) These actions were consolidated into *In re Gen. Elec. Co. Derivative Litig.*, under Index No. 655528/2020 (Derivative Action) on December 15, 2020 (Derivative Action, NYSCEF 23); the Derivative Action is stayed. (Derivative Action, NYSCEF 73.)

On December 31, 2020, the Board sent a letter to the Burdens’ counsel “refusing the Litigation Demands, while providing no documentation supporting the Board’s decision” (Refusal Letter). (NYSCEF 1, Complaint ¶¶ 17; NYSCEF 4, Refusal Letter.) On January 8, 2021, the Burdens filed a shareholder derivative action against GE and several individual defendants in federal court, asserting, amongst other allegations, that GE had wrongfully refused their demand for litigation. (NYSCEF 22, *Burden v Bazin et al.*, No. 21-cv-00182 [SD NY] [the Federal Action] Complaint.) After GE moved to dismiss the Federal Action, the U.S. District Court set a deadline for plaintiffs to file an amended complaint by February 22, 2021 (NYSCEF 24, Federal Action Scheduling

Order); the Burdens subsequently filed a Notice of Voluntary Dismissal Without Prejudice and Proposed Order (NYSCEF 25, the Federal Action Notice of Voluntary Dismissal) which the court at first denied, and then after a request to renew, granted. (NYSCEF 26, Federal Action Denial Order; NYSCEF 27, Federal Action Renewal Letter; NYSCEF 28, Federal Action Order Granting Voluntary Dismissal Without Prejudice.)

On March 1, 2021, the Burdens served GE with a demand for books and records (Books and Records Demands.) (NYSCEF 1, Complaint ¶ 18; NYSCEF 5, the Burdens Books and Records Demand²) seeking 14 categories of “certain books and records of GE” relating to the Board’s refusal of the Litigation Demands. (NYSCEF 1, Complaint ¶ 19; NYSCEF 5, Burdens Books and Records Demand; NYSCEF 29, Walkover Books and Records Demand.) The Books and Records Demands stated the following purposes:

“a) to evaluate the Board’s refusal of the Litigation Demand and whether same constituted a reasonable and good faith exercise of the Board’s business judgment;

b) to inquire into the independence, good faith, and due care of Cravath, the Audit Committee, and the Special Committee formed to consider the Litigation Demand; and

c) to take appropriate action in the event the members of the Board did not properly discharge their fiduciary duties in connection with the Litigation Demand and the investigation thereof.”

² Plaintiffs allege that they each served a books and records demand on March 1, 2021, but only attach a demand from the Burdens. (NYSCEF 5, Burden Books and Records Demand.) However, GE includes as an exhibit to its motion an inspection demand from Walkover dated February 26, 2021. (NYSCEF 29.)

(NYSCEF 5, Burdens Books and Records Demands at 5; NYSCEF 29, Walkover Books and Records Demands at 5; see *also* NYSCEF 1, Complaint ¶ 20.)

On March 8, 2021, GE's counsel responded to the Burdens Books and Records Demand, stating

“GE does not believe that New York law permits, under any circumstances, anything beyond the eight- page, single-spaced letter dated December 31, 2020 you received from Rachel G. Skaistis of Cravath, Swaine & Moore LLP. New York law certainly does not permit anything approaching the broad books and records inspection your clients have requested.”

(NYSCEF 1, Complaint ¶ 22; NYSCEF 6, March 8, 2021 Letter³.) GE's counsel further stated that it would provide, subject to a confidentiality agreement, documents to plaintiffs that other shareholders who had not yet filed litigation had accepted in response to demands, including “board and special committee minutes concerning the investigation and refusal of your clients litigation demands (as well as the other litigation demands addressed in Ms. Skaistis' December 31, 2020 letter) and independence questionnaires and Board determinations regarding independence.” (NYSCEF 1, Complaint ¶ 25; NYSCEF 6, March 8, 2021 Letter.) On March 18, 2021, the Burden's counsel responded, stating that GE's response was inadequate, and reaffirmed the Burdens' request for the same books and records. (NYSCEF 30, March 18, 2021 Letter.) Plaintiffs allege that they agreed to accept the documents offered by GE to “see if their Books and Records Demands could be resolved without court intervention, while expressly reserving all rights under New York law . . .” (NYSCEF 1, Complaint ¶ 26.)

³ Plaintiffs state in a footnote in the Complaint that a copy of this letter was also provided to Walkover. (NYSCEF 1, Complaint ¶ 22, n. 5.)

The parties entered into a confidentiality agreement (*id.* ¶ 27), and GE provided 407 pages of documents to plaintiffs (the Production). (*Id.* ¶ 28; NYSCEF 31, April 6, 2021 Letter.) Plaintiffs assert that the Production was deficient because “substantial portions of the Production were redacted and/or withheld on claims of privilege.” (*Id.* ¶ 30.) Plaintiffs also allege that there were no “foundational documents supporting the Special Committee’s and Board’s conclusions that either: (i) there was no claim to be had; or (ii) if there were a claim to be had, it was not in the Company’s best interests to pursue them.” (*Id.* ¶ 31.) Plaintiffs also assert that the production references documents that were not included in the Production, such as “minutes, memoranda, and presentation materials, which undoubtedly informed the Board’s decision to refuse the Plaintiffs’ Litigation Demands.” (*Id.* ¶ 32.) The Production also did not include any written conclusions from the Special Committee or its reasoning. (*Id.* ¶ 33.) Finally, plaintiffs assert that “the Production was devoid of any documents evidencing that the investigation was conducted by disinterested and independent individuals and entities” and “it appears that substantial elements of the investigation were conducted by entities with prior and/or subsequent relationships to the Company.” (*Id.* ¶ 34.)

Plaintiffs sent GE a letter on April 22, 2021 concerning these deficiencies and requested that they be cured (April 22, 2021 Letter). (*Id.* ¶ 35; NYSCEF 7, April 22, 2021 Letter⁴.) GE responded on April 27, 2021, stating “that there are no documents beyond what already has been produced reflecting independence evaluations by the

⁴ The court notes that plaintiffs improperly filed only a publicly redacted copy of this letter. Plaintiffs’ redaction of information in a public filing without permission of this court through a motion to seal is improper. Accordingly, plaintiffs are directed to file a motion to seal, which complies with the requirements set forth in the Part 48 Procedures, within 1 days of the date of this order or file an unredacted copy publicly.

special committee or board concerning the subject matter of your clients' litigation demands' and 'no documents beyond what already has been produced reflecting consideration or reconsideration concerning the subject matter [of] your clients' litigation demands after December 9, 2020,'" and declined to produce additional documents. (NYSCEF 1, Complaint ¶¶ 36-38; NYSCEF 8, April 27, 2021 Letter.)

On May 5, 2021, plaintiffs filed this action. On May 24, 2021, after GE had moved to dismiss the consolidated complaint in that action, plaintiffs moved in the Derivative Action to intervene and stay that action. (Derivative Action, NYSCEF 67, Notice of Motion [mot. seq. no. 003].) GE agreed to plaintiffs' intervention in that action and a stay pending a decision in this action. (Derivative Action, NYSCEF 72, Stipulation; NYSCEF 73, Order [granting motion to intervene and stay on consent, and amendment of summons and complaint to add the Burdens and Walkover].) GE subsequently filed a notice of withdrawal of its motion to dismiss without prejudice (Derivative Action, NYSCEF 76) and the motion was withdrawn. (Derivative Action, NYSCEF 77.)

Standard

GE fails to state in its notice or briefing, any statute upon which its "motion to dismiss" relies. Instead, GE fashions its papers as a motion to dismiss a special proceeding, even though plaintiffs filed this action by way of summons and complaint. Nevertheless, the court analyzes the motion as one to dismiss a complaint under CPLR(a)(1) and (7).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible

favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the “burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) “A cause of action may be dismissed under CPLR 3211 (a) (1) only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].)

Discussion

I. Count I – Books and Records Demand Pursuant to BCL § 624

GE argues that plaintiffs’ claim under Count I fails because BCL § 624 does not permit inspection of the books and records that plaintiffs seek in this action. Section 624 permits inspection of a corporation’s “minutes of the proceedings of its shareholders and record of shareholders” and “an annual balance sheet and profit and loss statement for the preceding fiscal year, and, if any interim balance sheet or profit and loss statement has been distributed to its shareholders or otherwise made available to the public, the most recent such interim balance sheet or profit and loss statement.” (Business Corporation Law § 624 [b], [e].)

During argument on this motion, plaintiffs admitted that “the records that we do seek do not fall under the enumerated categories of [Section 624] and so we would be

seeking them under the New York Common Law . . .” (NYSCEF 54, tr. at 19:9-20; 24:1-6.) Thus, Count I of the complaint is dismissed without prejudice.

II. Count II – Books and Records Demand Pursuant to New York Common Law

Plaintiffs’ second count in the complaint seeks books and records pursuant to New York common law. “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.” (*Ret. Plan for Gen. Emps. of City of N. Miami Beach v McGraw-Hill Companies, Inc.* [McGraw], 120 AD3d 1052, 1055 [1st Dept 2014] [citations omitted]; see also *Crane Co. v Anaconda Co.*, 39 NY2d 14, 18 [1976].) “The statutory right supplemented, but did not replace, the common-law right.” (*Mc-Graw*, 120 AD3d at 1055 [citations omitted].)

“‘Proper purposes’ are those reasonably related to the shareholder’s interest in the corporation, and may include efforts to investigate management's conduct and to obtain information in aid of legitimate litigation.” (*Bed Bath & Beyond Inc. v Hill*, 2008 WL 6487330, at *2 [Sup Ct, NY County 2008], quoting *Tatko v Tatko Bros. Slate Co.*, 173 AD2d 917, 917–18 [3d Dept 1991].) “Improper purposes are those which are inimical to the corporation, for example, to discover business secrets to aid a competitor of the corporation, to secure prospects for personal business, to find technical defects in corporate transactions to institute strike suits, and to locate information to pursue one's own social or political goals.” (*Tatko*, 173 AD2d at 917–18 [internal quotation marks and citation omitted].)

Courts may dismiss a books and records demand where a plaintiff’s “asserted purposes for the inspection [are] speculative, vague, and conclusory.” (*JAS Fam. Tr. v*

Oceana Holding Corp., 109 AD3d 639, 643 [2d Dept 2013]; see also *Beatrice Corwin Living Irrevocable Trust v General Elec. Co.*, 2015 NY Slip Op 32656[U] [Sup Ct, NY County 2015] [dismissing complaint demanding inspection of books and records where plaintiff failed to adequately allege a proper purpose for the demand].)

GE argues that plaintiffs' true purpose for their demand is to institute a strike suit, and that this purpose is apparent from the Burdens' filing a complaint in the Federal Action, withdrawing that complaint in the face of a motion to dismiss, and then intervening and staying the derivative action with plaintiff Walkover to "fish for facts" to allege a third complaint. Plaintiffs do not deny that they intend to use the information gathered from GE's books and records to bolster the complaint in the Derivative Action⁵ but rather argue that there is no rule preventing inspection in this procedural posture and that they have asserted a proper purpose to evaluate the Board's decision.

Plaintiffs do not have a proper purpose here. GE cites to several cases which demonstrate that, under New York law, "[t]he common-law right of inspection cannot be used to circumvent limitations on the scope or timing of disclosure in pending litigation." (See *Galasso v Cobleskill Stone Prod., Inc.*, 73 Misc 3d 1231[A] [Sup Ct, Albany County 2021] [internal quotation marks and citations omitted] [finding petitioner's asserted desire to use a corporation's tax returns in a valuation proceeding was not a proper purpose where petitioner had had an opportunity to seek discovery in a prior dissolution

⁵ "Plaintiffs do intend to use the documents that they obtain from this books and records action to draft an amended complaint in [the Derivative Action] in an effort to allege more particularized facts that regard the Board's and Special Committee's process in rejecting the litigation demand and will therefore have a better chance of success and help, your Honor, to decide the issues that will ultimately be before her in the plenary case." (NYSCEF 54, tr. at 18:4-12.)

proceeding]; *Bed Bath & Beyond Inc.*, 2008 WL 6487330, at *2 [finding in special proceeding that plaintiff could not seek documents beyond publicly disclosed findings of Special Committee investigation where “they do not state a proper purpose to examine all documents generated during the internal investigation, including privileged matter, that they already sought and were unable to obtain in three failed attempts at derivative litigation involving the same conduct.”])

GE also relies on cases denying discovery prior to a determination on a motion to dismiss in shareholder derivative actions. Specifically, in *Lerner v Prince*, the First Department, analyzing Delaware law, affirmed denial of the shareholder plaintiffs’ motions to compel discovery and convert defendants’ motions to dismiss to summary judgment motions. (119 AD3d 122, 129 [1st Dept 2014].) The court also stated, albeit dicta, that:

“[E]ven assuming for the sake of argument that New York law applies, plaintiff would not be entitled to discovery in this demand-refused case. Courts applying New York law in demand-refused cases presume that a board of directors’ decision was the exercise of valid business judgment. Therefore, where, as here, a complaint fails to set forth allegations overcoming the presumption that the board’s decision resulted from that valid judgment, courts will properly deny a plaintiff’s discovery request . . .”

(*Id.* at 129-30 [citation omitted].) While the court does not decide here whether the pleading standards described in *Lerner* are applicable to New York derivative complaints, the principle of that holding remains, that “[t]he purpose of discovery is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists.” (119 AD3d at 130 129 [internal quotation marks and citation omitted].)

The cases cited by plaintiffs do not suggest otherwise. Specifically, plaintiffs cite to *Santelli v Spitzer*, in which the court, in dismissing a complaint by a shareholder

asserting claims of mismanagement, held that the fact “[t]hat plaintiffs are unable to furnish more particulars because [defendants’ company], as Managing Member, has all of the information in its control is not a basis to excuse their deficient pleading or to grant a continuance to allow discovery that would permit the pleading of such particulars.” (2021 WL 2209390, 2021 NY Slip Op 31855[U] at *4 [Sup Ct, NY County 2021] [internal quotation marks omitted].) The court, citing *Lerner*, noted that “plaintiffs could have, but did not, make a books and records demand⁶. . . which, even if refused, could have been pursued in a special proceeding.” (*Id.*) The court in *Santelli* did not suggest that a stay of an action to seek books and records is a proper method for bolstering an already filed complaint. Rather, it suggests that the plaintiffs here—particularly the Burdens who filed a complaint in federal court—could have, but chose not to, take advantage of their inspection rights. Thus, New York law makes clear that the purpose of bolstering a previously filed complaint is not a proper one for inspection.

Plaintiffs also cite to *King v Verifone Holdings, Inc.*, in which the Delaware Supreme Court held that there is no “bright-line rule barring stockholder-plaintiffs from pursuing inspection relief under 8 Del. C. § 220 solely because they filed a derivative action first” (12 A3d 1140, 1145 [Del 2011].) Even if it were necessary for this court to look to Delaware law for its decision, that case would not change it. As the Chancery Court in *CHC Investments, LLC v FirstSun Capital Bancorp* explained, that holding is limited to the factual circumstances of that case, where the plaintiff had previously filed a derivative action in California

⁶ The court was citing to the provision of the company’s operating agreement that required the company to keep certain books and records.

federal court, and “[i]n dismissing the claims, the California court expressly encouraged the plaintiff to demand inspection in order to meet the onerous pleading requirements applicable to derivative claims.” (2019 WL 328414, at *3 [Del Ch 2019] [dismissing Section 220 action to investigate pending claims in a plenary action].)

The same facts are not present here, and regardless of the precise timing of plaintiffs’ filing this books and records action and intervening in the Derivative Action, their purpose of bolstering the complaint in the Derivative Action is improper. Thus, contrary to plaintiffs’ argument, the fact that plaintiffs in this action are not the original plaintiffs in the Derivative Action, but rather intervened in the Derivative Action—very shortly—after filing this books and records demand is a distinction without a difference, (David D. Siegel & Patrick M. Connors, *New York Practice* § 178 [6th ed 2018 & Supp 2022] [“Once let in, the intervenor becomes a party for all purposes”]), and plaintiffs have admitted that they intend to use the information gathered in this proceeding to bolster the complaint in the Derivative Action.

Finally, plaintiffs cite *In re Freeport-McMoRan Copper & Gold Inc. Derivative Litig.* [Freeport], in which the Delaware Chancery Court permitted parties to intervene in a related derivative action, without filing a substantive complaint, while also pursuing a books and records action. (2013 WL 616296, at *2 [Del Ch 2013].) However, in *Freeport*, the plaintiffs intervened to certify an interlocutory appeal of the court’s decision “establishing a plaintiffs’ management structure . . .” and were simultaneously pursuing a books and records action to

determine whether to file a derivative claim. (*Id.* at *1-2 [noting that “[t]he Court cannot address at this time what it would do if the Proposed Intervenors' books and records effort generates significant and, at the time, new information regarding the conduct of Freeport's directors.”]) This is a very different situation from the one here where plaintiffs have stayed the Derivative Action to pursue an inspection to bolster a previously filed complaint that they assert is inferior.

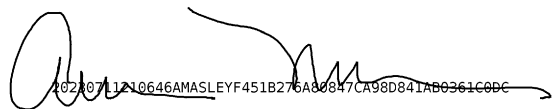
The court has considered the parties’ remaining arguments and finds they do not alter this decision.

Accordingly, it is

ORDERED that GE’s motion to dismiss is granted, and the complaint is dismissed without prejudice; and it is further

ORDERED that the stay in *In re Gen. Elec. Co. Derivative Litig.*, Index No. 655528/2020, is lifted, and defendant General Electric Company shall file a copy of this order in that action; and it is further

ORDERED that plaintiffs must, within 10 days of this decision, either file a motion to seal and/or redact NYSCEF 7, which follows the requirements for a motion to seal set forth in the Part 48 Procedures or file an unredacted public copy of that document.



7/11/2023
DATE

ANDREA MASLEY, J.S.C.

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APPLICATION:

CHECK IF APPROPRIATE:

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