Kordonsky v Brudoley
2024 NY Slip Op 32768(U)
August 6, 2024
Supreme Court, Kings County
Docket Number: Index No. 524563/2023
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
---x
MICHAEL KORDONSKY, individually and on behalf of Dial Car Inc., and JEFFREY GOLDBERG, individually and on behalf of Dial Car Inc.,
Plaintiffs,

Decision and order

- against -

Index No. 524563/2023

ALEX BRUDOLEY, MARK LEVSHITS, DEMETRIOS SARDELIS, ANASTASIOS KOSTARELOS, MARK BARISHMAN, DAVID UKILIS, LEV BEYEDER, AVENUE X REALTY NY LLC, WEBSTER BANK NATIONAL ASSOCIATION,
Defendants,

August 6, 2024

and DIAL CAR INC.,
Nominal Defendant,
---x
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #3 & #4

The defendants Alex Brudoley, Mark Levshits, Demetrios Sardelis, Anastasios Kostarelos, Mark Barishman, David Ukilis and Lev Beyeder have moved pursuant to CPLR §3211 seeking to dismiss the complaint. The nominal defendant Dial Car Inc., has cross-moved also seeking to dismiss the complaint. The plaintiff has opposed the motions. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The defendant Dial Car Inc. is a black car livery service that provides transportation for its clients. As recorded in prior orders, the plaintiff, on behalf of Dial Car Inc., commenced this derivative action alleging the board of directors of the corporation engaged in illegitimate activities for their own benefit at the expense of the corporation. Specifically, the complaint alleges the defendants sold the property where Dial Car Inc., was headquartered without shareholder approval and initiated lawsuits against the plaintiff to satisfy personal vendettas. The defendants have now moved seeking to dismiss the complaint on the grounds it fails to allege any causes of action. As noted, the motions are opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Perez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Archival Inc., v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept., 2023]).

On May 21, 2019 the board of directors sent a letter to the shareholders informing them of the changing landscape of the livery car business and the high costs associated with the buildings owned by the corporation. The letter outlined two options for which they were seeking shareholder approval, namely whether to sell all of Dial's real property located at 2104-2106 Avenue X and 2108 Avenue X in Kings County or to only sell the property located at 2104-2106 Avenue X. The actual ballot contained two columns, one with the two choices noted above and a vote to approve such sales. The second column contained a third choice, namely a vote not to sell any of the corporate properties. Laurence Cohen, an inspector of the ballots submitted an affidavit wherein he noted that three hundred and seventeen shareholders voted 'yes' while eight-one voted 'no' (see, NYSCEF Doc. No. 80]). Based upon that vote the board of directors sold all the properties in July 2022.

The defendants argue the approval of the shareholders eliminates any possible claims the sale was improper. However, concerning the sale of assets the shareholders were provided with two options, either to sell all the assets or some of the assets. Although the shareholders approved of selling assets there has been no conclusive evidence presented which option was chosen by the shareholders. Indeed, Laurence Cohen the inspector of ballots admits that "a proposal was made by the Board of Directors of Dial Car, Inc. to pursue the sale of some or all of the corporation's real estate, and use the proceeds to satisfy corporate obligations" (see, Report of Inspector of Ballots, ¶1 [NYSCEF Doc. No. 80]). While the shareholders supported the sale of assets there is no indication if they approved selling all the assets or only some of the assets. Thus, there are surely questions of fact whether the board of directors exceeded their authority provided by the shareholders by selling all the assets of Dial Car.

Moreover, the vote was conducted in May 2019 and the sale occurred over three years later. There are surely questions whether the approval provided, to whatever extent, may have been rendered stale by the sheer passage of time. This is particularly true since the original vote in 2019 was not accompanied with any details at all about the nature of the sale of the corporate assets, the price, or any of its terms. Indeed, there is no evidence there was any communication with the shareholders concerning any efforts being made in the ensuing three years. There are surely questions whether the sudden and unexpected sale in the summer of 2022 can be linked back to the approval afforded years earlier. Therefore, the mere fact a shareholder vote took place does not "utterly refute" plaintiff's allegations.

Turning to the plaintiff's standing to sue, Business Corporation Law §626© states that no derivative lawsuit may be commenced unless the complaint alleges "with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making the effort" (id). As the Supreme Court noted, for a stockholder to sue derivatively "he must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court" (see, Hawes v. City of Oakland, 104 US 450, 14 Otto 450 [1881]).

The defendants argue the plaintiff failed to comply with that provision and that consequently the plaintiff has no standing to pursue the claims. The plaintiff counters that specific evidence such notice would have been futile was presented and that therefore such demand futility has been presented.

To succeed upon an assertion that notice would have been futile and hence not required, specific facts must be presented that the individual at issue was self-interested in the transactions (see, Bansbach v. Zinn, 1 NY3d 1, 769 NYS2d 175 [2003]. Thus, the plaintiff must establish that if a demand would have been filed with the Board of Directors or with the defendants they could not have exercised independent and disinterested business judgement (id). Thus, the individual defendants will be considered incapable of being disinterested if facts support a personal benefit to them regarding the transactions being challenged (id). In that instance the business judgement rule is inapplicable and demand futility is established.

The defendants argue the standard for demand futility has not been met since the futility has not been presented with sufficient particularity. However, particularity governs the totality of the futility and as long as such futility can be discerned by the court then the particularity will naturally suffice. Thus, where the directors are accused of self-dealing then obviously futility has been presented (see, Soho Snacks Inc., v. Frangioudakis, 129 AD3d 636, 13 NYS3d 31 [1st Dept., 2015]). The nature of the claims against the defendants reveal that such demand would have been futile (see, Recine v. Recine, 201 AD3d 827, 161 NYS3d 307 [2d Dept., 2021]). Thus, demand futility has been established.

Turning to the specific causes of action, at this juncture they all allege specific claims. The mere fact there are other litigations between the individual plaintiff and defendants attests to the litigious nature of the parties, not to validity of any claims. However, the claim for unjust enrichment is duplicative of other torts alleged. It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]).

Therefore, the motion seeking to dismiss this claim is granted.

The motions seeking to dismiss any of the other causes of action of the complaint are denied.

So ordered.

ENTER:

DATED: August 6, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC