

Matter of Wolf v Enzo Biochem, Inc.

2025 NY Slip Op 30640(U)

February 19, 2025

Supreme Court, Suffolk County

Docket Number: Index No. 623946/2023

Judge: James Hudson

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**Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE: 10/18/24
SUBMIT DATE: 1/15/25
Mot. Seq. #: **004 - MotD**

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In the Matter of the Application of:

JAMES M. WOLF, INDIVIDUALLY AND AS
THE TRUSTEE OF THE WOLF FAMILY
CHARITABLE FOUNDATION; BARBARANNE
R. WOLK; STEPHEN PAUL WOLF; and
PRESTON M. WOLF,

Petitioners,

-against-

ENZO BIOCHEM, INC., a New York Corporation,

Respondent,

To Fix the Value of the Common Shares of Enzo
Biochem, Inc., pursuant to Section 623 of the New
York Business Corporation Law.

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Enzo Biochem, Inc. (“Enzo”) requests an order: 1) pursuant to **CPLR 2221 (d)**, granting Enzo leave to reargue the August 21st, 2024 order (“Order”); and 2) upon reargument, denying dismissal of the Second and Third affirmative defenses in the verified answer.

This is a matter concerning the asset sale of a publicly held corporation. The terms of an asset purchase agreement entitled dissenting shareholder to a determination of fair

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market value of their common stock and to receive payment for those shares. The petitioners, James G. Wolf, individually and as trustee of the Wolf Family Charitable Foundation, Barbaranne R. Wolf, Stephen Paul Wolf, and Preston M. Wolf (“Wolf Shareholders”), elected to deliver a combined 4.8 million shares of the common stock of respondent Enzo for valuation and payment, upon proxy notice of the sale of Enzo Clinical Labs, Inc. to Laboratory Corporation of America Holdings (“Labcorp”). Enzo subsequently filed a Schedule 14A SEC Proxy Statement which provided notice to stockholders of the asset sale proposal and dissenters’ rights. Enzo also filed a Form 8-K Proxy Supplement which did not alter the dissenters’ rights. The Wolf Shareholders delivered a notice of stockholder objection and elected to dissent. The asset sale was approved at a shareholders’ meeting which the Wolf Shareholders did not attend pursuant to the dissent notice. The Wolf Shareholders delivered their stock to the transfer agent pending valuation and payment. Enzo filed a second Form 8-K which amended certain terms of the sale (“Amendment”). Enzo alleges the Amendment constituted a new transaction not bound by the earlier dissent notice. On July 24th, 2023, the asset sale closed. Enzo refused to value the tendered Wolf Shareholders’ stock and did not make payment for those shares. The Wolf Shareholders filed the instant petition, and thereafter successfully moved to strike Enzo’s second and third affirmative defenses. The second alleged that the verified petition asserts appraisal rights related to a transaction which was never consummated. The third alleged that the consummated transaction did not give rise to appraisal rights. Enzo now moves to reargue the Order which struck those affirmative defenses.

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Enzo's request for reargument is granted. While oral argument was requested, the Court, in its discretion, will decide the motion on the papers presented to determine whether it overlooked or misapprehended any controlling fact or law in rendering its decision (*A.R. Connelly, Inc. v. New York City Charter High Sch. for Architecture, Eng'g & Constr Indust.*, 206 AD3d 787, 788-789, 170 NYS3d 571 [2d Dept 2022]).

Reargument is not a forum to provide an unsuccessful party with successive opportunities to merely present its previous arguments (*Pryor v. Commercial Land Title Insurance Company*, 17 AD3d 44, 793 NYS2d 452 [2d Dept 2015]). Reargument is also not designed for the presentation of different arguments from those previously asserted (*William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22, 588 NYS2d 89 [1st Dept 1992]; see *Ahmed v. Pannone*, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014]).

Counsel for Enzo argues that the Court made a "foundational error" in striking its second and third affirmative defenses:

The foundational error upon which the Dismissal Decision was premised was the Court's *presumption* that the transaction at issue – whether under the initially contemplated Asset Purchase Agreement or the subsequent Agreement – give rise to Petitioner's claimed dissenting shareholders' appraisal rights *without* performing the threshold statutory analysis or whether the subject transaction triggered those rights under **BCL §910** in the first place. By dissenting, on a pre-disclosure motion, Enzo's two affirmative defenses challenging the baseline availability of dissenters' rights, the Court wholesale accepted Petitioners' self-serving argument that the Court need not bother looking past certain writings to assume the existence of dissenters' rights here. That was legal error.

No writing, letter, proxy, *pinky promise*, or any other written or oral agreement can grant statutory dissenters' rights under **BCL §§ 909** and **910** where none exist, nor excuse procedural compliance with **BCL §623**, because – unlike their brethren

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throughout the **BCL**, **LLC Law**, and **Partnership Law** – these statutes do not contain a contractual *opt out* clause (*i.e.*, “unless otherwise provided”) to allow parties to modify the entitlements and requirements therein. (NYSCEF Doc No. 107, at 1).

This argument was not previously made by Enzo and is barred in reargument (**CPLR 2221 [d] [2]**). The disputed affirmative defenses concern the effect of the Amendment on the asset sale. Whether the Wolf Shareholders complied with the noted statutes is not a factor in whether the Amendment modified the terms of the asset sale.

In its Order, the Court stated:

The amendment modified specific agreement terms and incorporated its notice provisions and otherwise declared that the agreement remained in full force and effect. It states that the agreement and the amendment concern the sale of the “Business”, which was limited to the clinical lab’s subsidiary of Enzo. It does not state that the agreement has been superseded nor that a dissent notice filed pursuant to the proxy statement is null and void. . Counsel for Enzo argues in opposition that the amendment constitutes a new transaction which renders the dissent notice inapplicable due to the revisions made by the amendment. . Therefore, he contends, the dissent notice is inapplicable to the consummated, amended sale. The Court, for the reasons discussed hereinabove, does not agree. The balance of the respondent’s arguments have been carefully considered and are denied.

Counsel for the Wolf Shareholders correctly argues that “the Court was not required to make a further [**BCL**] §909 determination to dismiss the [affirmative] Defenses, which were foreclosed by the language of the Purchase Agreement and the Amendment and subject to estoppel” (NYSCEF Doc No. 95, at 4).

Enzo argues that there were two distinct transactions. The plain language of the documents in issue clearly refutes that argument. The documents establish that the

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agreement and Amendment pertain to the same transaction against which the Wolf Shareholders dissented.

The artful legerdemain by Enzo does not demonstrate or persuade the Court that it overlooked or misapprehended either fact or law in its decision and order. The Court has carefully considered the balance of the arguments presented by the respondent; and is not persuaded that it erred in its prior decision. The relief requested in reargument will be denied.

Accordingly, it is

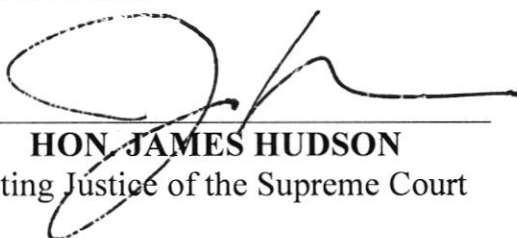
ORDERED, that the motion (seq. no. 004) by the respondent, Enzo Biochem, Inc., which requests pursuant to **CPLR 2221 (d)**, leave to reargue the August 21st, 2024 order, is granted; and it is further

ORDERED, that the request to deny dismissal of the Second and Third affirmative defenses in the verified answer is denied; and it is further

ORDERED, that upon due consideration, the Court adheres to its previous determination.

This memorandum also constitutes the Order of the Court.

Dated: February 19th, 2025
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court