Shaev v Adkerson
2009 NY Slip Op 33331(U)
June 11, 2009
Supreme Court, New York County
Docket Number: 650425/08
Judge: Barbara R. Kapnick

BARBARA R. KAPNICK

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 39

Index Number : 650425/2008
SHAEV, VICTORIA A.
vs.
ADKERSON, RICHARD A.
SEQUENCE NUMBER : 001
SECURITY FOR COSTS/PAYMENTS

INDEX NO. 650425/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered in this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

E-FILE

FILED
Jun 11 2009
NEW YORK
COUNTY CLERK'S OFFICE

Scanned to New York EF on 6/11/09

Dated: 6/11/09

BARBARA R. KAPNICK J.S.C.
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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VICTORIA A. SHAEV,

Plaintiff,

-against-

RICHARD C. ADKERSON, JAMES MOFFETT, ARCHIE W. DUNHAM, WILLIAM A. FRANKE, ROBERT D. JOHNSON, MARIE L. KNOWLES, GORDON R. PARKER, WILLIAM J. POST, MARTIN H. RICHENHAGEN, JACK E. THOMPSON, J. STEVEN WHISLER, ROBERT J. ALLISON, JR., ROBERT A. DAY, GERALD J. FORD, H. DEVON GRAHAM, JR., J. BENNETT JOHNSTON, CHARLES C. KRULAK, BOBBY LEE LACKEY, JON C. MADONNA, DUSTAN E. McCOY, GABRIELLE J. McDONALD, B. M. RANKIN, JR., J. STAPLETON ROY, STEPHEN H. SIEGELE, J. TAYLOR WHARTON, PHELPS DODGE CORPORATION, and FREEPORT-McMORAN COPPER & GOLD, INC.,

Defendants.

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DECISION/ORDER
Index No. 650425/08
Motions Seq. Nos.
001, 002 and 003

BARBARA R. KAPNICK, J.:

Motions sequence numbers 001, 002 and 003 are consolidated for disposition.

Plaintiff Victoria Shaev is a stockholder of defendant Freeport-McMoRan Copper & Gold, Inc. ("Freeport"), a publicly traded mining company which is incorporated in Delaware. On or about March 19, 2007, Freeport entered into a merger transaction with defendant Phelps Dodge Corporation ("Phelps"), another mining company and a New York corporation, pursuant to which Phelps became a wholly-owned subsidiary of Freeport.

In the Complaint, plaintiff alleges that insufficient disclosures associated with the merger, including those contained in a joint proxy statement/prospectus to the Freeport stockholders and Phelps stockholders dated February 12, 2007, and subsequent compensation decisions by Freeport's Board of Directors resulted in Freeport's paying excessive compensation to Freeport's Chairman, defendant James R. Moffett, and Freeport's President and Chief Executive Officer, Richard C. Adkerson.

The Complaint seeks a judgment: (i) granting an injunction against further incentive payments under Freeport's annual incentive plan; (ii) granting an injunction against mis-timed or untimely grants of stock options; (iii) directing an equitable accounting against all the individual defendants in favor of Freeport and Phelps for the injuries they have sustained and will sustain by virtue of the conduct alleged therein; and (iv) awarding plaintiff the costs and disbursements of this action, including reasonable accountants', experts' and attorneys' fees.

Defendants Freeport and Phelps (the "Corporate Defendants") now move, under motion sequence number 001, for an order pursuant to Business Corporation Law ("BCL") § 627:

(a) requiring plaintiff to give to the Corporate Defendants security for $176,550.00 - that amount constituting the reasonable

expenses, including attorneys' fees, in connection with filing, briefing and arguing of anticipated motions to dismiss this action, which may be incurred by the Corporate Defendants and by the other party defendants in connection therewith for which the Corporate Defendants may become liable under the BCL, under any contract, or otherwise under law - to which the Corporate Defendants shall have recourse in such amount as the Court shall determine upon the termination of this action; and

(b) providing that pending the deposit of such security with the Corporate Defendants, all further proceedings in this action be stayed.

Plaintiff opposes the motion and moves, in the alternative, under motion sequence number 002, for an order pursuant to BCL § 627 requiring defendant Freeport to deliver to plaintiff for inspection a list of Freeport's stockholders and to give stockholders 120 days from the date of plaintiff's receipt of that list to move to join the action.[1]

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[1] Pursuant to BCL § 624(b), "[a]ny person who shall have been a shareholder of record of a corporation upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder."

Plaintiff also moves, under motion sequence number 003, for an order pursuant to CPLR § 3124 directing the defendants to produce and permit plaintiff, by her attorneys, to inspect, copy, or photograph all books, papers, records or documents according to the Document Demand.

BCL § 627 provides as follows:

> In any action specified in section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor), unless the plaintiff or plaintiffs hold five percent or more of any class of the outstanding shares or hold voting trust certificates or a beneficial interest in shares representing five percent or more of any class of such shares, or the shares, voting trust certificates and beneficial interest of such plaintiff or plaintiffs have a fair value in excess of fifty thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which the corporation may become liable under this chapter, under any contract or otherwise under law, to which the corporation shall have recourse in such amount as the court having jurisdiction of such action shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or excessive.

There is no dispute that plaintiff holds less than five percent of any class of the outstanding shares, holds voting trust certificates or a beneficial interest in shares representing less

than five percent of any class of such shares, and that the shares, voting trust certificates and beneficial interest of the plaintiff have a fair value less than fifty thousand dollars.[2]

The Corporate Defendants thus argue that they are entitled under BCL § 627 to reasonable expenses, including attorneys' fees, associated with the filing, briefing and arguing of anticipated motions to dismiss this action.

Plaintiff argues in opposition that the Corporate Defendants do not have the right to security for expenses because the law of Delaware, where Freeport is incorporated, contains no provision allowing a court to require security for expenses in a stockholder's action.

However, pursuant to BCL § 1319(a)(3), section 627 is expressly made applicable to foreign corporations doing business in New York. Here, plaintiff has presented no evidence to refute Freeport's claim that it is doing business in New York.[3] Moreover,

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[2] Plaintiff allegedly owns only 4 shares in Freeport, or approximately 0.0000011% of Freeport's outstanding common stock. Plaintiff's holding in the company on January 2, 2009, when the closing price for Freeport shares was $26.74, was worth $106.96.

[3] Freeport represents that: (a) it has an employee in New York; (b) its officers frequently travel to New York to meet with

the Corporate Defendants argue that Phelps, a New York corporation, is certainly entitled to seek relief under BCL § 627.

Plaintiff alternatively argues in a letter submitted to this Court on April 17, 2009, that this Court should deny the Corporate Defendants' motion for security for expenses on the ground that this action has already resulted in a benefit to Freeport. Specifically, plaintiff claims that Freeport filed a Form 8-K with the United States Securities and Exchange Commission on February 5, 2009, three months after the Complaint in this action was filed, to report that defendants Adkerson and Moffett had declined to accept an annual cash incentive award for 2008, resulting in an $88 million savings for the company. *See Ripley v International Rys. of Cent. Am.*, 16 AD2d 260 (1st Dep't 1962), *aff'd* 12 NY2d 814 (1962), which held that "[b]eneficial acts performed by the corporation -- if the result, in whole or in substantial part, is attributable to the stockholders' litigation -- may be a valid basis to claim compensation", and found that in the context of that suit, "there

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representatives from Freeport's bank, JPMorgan Chase, and with representatives from other banks, investors, potential investors, customers and vendors; (c) a substantial majority of Freeport's bank accounts are in New York; (d) a substantial majority of the money that Freeport transfers to or from non-Freeport entities flow through the New York accounts; and (e) Freeport's shares are listed on the New York Stock Exchange.

was a sufficient causal connection to sustain compensation for the resulting benefit to the corporation." *Id.* at 264-265.

Plaintiff further argues in a letter dated May 12, 2009 that she should be entitled to an interim award of attorneys' fees based on the ameliorative action which plaintiff contends was taken in response to the Complaint.

The Corporate Defendants, in a letter dated April 24, 2009, deny that there is a sufficient causal connection between the commencement of this lawsuit and the decision of its two senior managers, and contend that the "far more logical inference" is that Adkerson and Moffet declined the incentive payments because Freeport was impacted by the unprecedented financial crisis.

The Corporate Defendants further argue in that letter that as the Appellate Division, First Department, noted in *Ripley v International Rys. of Cent. Am., supra,*

> [it] would be unwise to authorize compensation to counsel for a stockholder whenever management took action beneficial to the corporation as a result of a request or demand by a stockholder. That management moved in order to forestall a derivative action is immaterial.

Id. at 264. *See also, Garfield v Equitable Life Assur. Society of the United States*, 24 AD2d 74 (1st Dep't 1965).

Here, there is an insufficient basis at this time to establish a causal connection between the commencement of this lawsuit and any actions taken by Freeport or the individual defendants. Therefore, the Corporate Defendants are entitled to security for expenses pursuant to BCL § 627.

Accordingly, the Corporate Defendants' motion is granted, and plaintiff shall be required to give to Corporate Defendants security for $176,550.00.

Plaintiff's motion (seq. no. 002) to require defendant Freeport to deliver to plaintiff for inspection a list of Freeport's stockholders is withdrawn without prejudice pursuant to Stipulation and Order Regarding Plaintiff's Motion to Inspect Defendant's Corporate Stockholder's List to Enlist Additional Stockholders dated April 28, 2009, in the form so-ordered by this Court on June 11, 2009.[4]

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[4] The Stipulation and Order provides, *inter alia*, that

> Plaintiff shall have 120 days from the date by which Freeport is required to deliver a Current Shareholder

It is noted that the Corporate Defendants requested the following provision to be included in that Order:

> After entry by this Court of an Order Requiring Security, Plaintiff and the Corporate Defendants shall negotiate in good faith concerning the written communication that Plaintiff intends to send to some or all holders of Freeport's common stock. If the parties have failed to reach agreement within ten business days concerning such a communication, the parties will submit their disagreement to the Court for resolution. Such a submission will have the effect of staying, until a ruling by the Court, any time requirements otherwise imposed by this Stipulation and Proposed Order, including the requirements outlined in paragraphs (1), (3), and (5).

A similar provision was directed by the court in *Nemo v Allen*, 466 FSupp 192 (SDNY 1979). However, this equitable approach is not mandated by CPLR § 624.

Moreover, the Court of Appeals has held that

> [a] shareholder desiring to discuss relevant aspects of a tender offer should be granted access to the shareholder list unless it is sought for a purpose inimical to the corporation or its stockholders--and the manner of communication selected should be within the judgment of the shareholder [emphasis supplied].

List either to post a bond in an amount sufficient to satisfy the Order Requiring Security, or to join to this action plaintiffs holding a sufficient number of additional shares such that Plaintiff is not required to post a bond pursuant to N.Y. Bus. Corp. Law § 627. Should neither of the requirements in this paragraph be met within 120 days, the Corporate Defendants intend to seek dismissal of this action.

Matter of Crane Co. v Anaconda Co., 39 NY2d 14, 17 (1976). Accordingly, the provision requested by the Corporate Defendants which seeks input into plaintiff's communication with other shareholders has not been included in this Court's Order.[5]

Plaintiff's motion to compel general discovery is denied with leave to renew after the posting of the security directed herein (or the joinder of a sufficient number of additional shareholders in a derivative suit) and the determination of the anticipated motions to dismiss plaintiff's Complaint.

This constitutes the decision and order of this Court.

Date: June 11, 2009

Barbara R. Kapnick
J.S.C.

[5] The mere fact that the parties are engaged in litigation does not demonstrate lack of good faith on the part of plaintiff. *Matter of Lopez* (SCM Corp.), 71 AD2d 976 (1st Dep't 1979).