

Buhannic v TradingScreen, Inc.
2017 NY Slip Op 32594(U)
December 12, 2017
Supreme Court, New York County
Docket Number: 653624/2016
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK -- PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

..... X
PHILIPPE BUHANNIC and PATRICK
BUHANNIC,

Index No.: 653624/2016

Plaintiffs,

-- against --

DECISION/ORDER

TRADINGSCREEN, INC., et al.,

Defendants.

..... X

This action arises out of the termination of plaintiff Philippe Buhannic (Philippe)¹ as CEO of defendant TradingScreen, Inc. (TradingScreen). Pursuant to an Indemnification Agreement between Philippe as Indemnitee and TradingScreen, dated September 11, 2007 (Agreement), plaintiffs move for an order directing TradingScreen to advance expenses reasonably incurred and to be incurred by Philippe in three matters: an action brought in Delaware under Delaware Code, title 8, section 225 (Delaware 225 action), an investigation of Philippe’s involvement with another company, SpreadZero (SpreadZero Investigation), and the instant action. Philippe also seeks advancement of expenses reasonably incurred or to be incurred on the instant motion.

The Advancement of Expenses section of the Agreement provides:

“Notwithstanding any other provision of this Agreement, the Company [TradingScreen] shall advance all Expenses incurred by or on behalf of Indemnitee in connection with any Proceeding by reason of Indemnitee’s Corporate Status within ten (10) days after the receipt by the Company of a statement or statements from Indemnitee requesting such advance or

¹ Philippe Buhannic is referred to as Philippe not out of disrespect but to distinguish him from co-plaintiff Patrick Buhannic.

advances from time to time, whether prior to or after final disposition of such Proceeding (an “Expense Advance”). Such statement or statements shall reasonably evidence the Expenses incurred by Indemnitee and shall include or be preceded or accompanied by an undertaking by or on behalf of Indemnitee to repay any Expenses advanced if it shall be ultimately determined that Indemnitee is not entitled to be indemnified against such Expenses. In connection with any Expense Advance, the Company may, as a condition to making such Expense Advance, require reasonable assurance from the Indemnitee with respect to his agreement to reimburse such Expense Advance”

(Agreement § 4.)

The term “‘Corporate Status’ describes the status of a person who is or was a director or officer of the Company” (Id. § 12 [a].) The Agreement further provides the following

“Exception to Right of Indemnification”:

“Notwithstanding any other provision of this Agreement, Indemnitee shall not be entitled to indemnification under this Agreement with respect to any Proceeding brought by Indemnitee, or any claim therein, unless (a) the bringing of such Proceeding or making of such claim shall have been approved by the Board of Directors of the Company or (b) such Proceeding is being brought by Indemnitee to assert, interpret, or enforce his rights under this Agreement.”

(Id. § 8.) Indemnification is available to the extent that the Indemnitee is successful in whole or in part:

“If Indemnitee is not wholly successful in such Proceeding but is successful, on the merits or otherwise, as to one or more but less than all claims, issues or matters in such Proceeding, the Company shall indemnify Indemnitee against all Expenses actually and reasonably incurred by him or on his behalf in connection with each successfully resolved claim, issue or matter. For purposes of this Section and without limitation, the termination of any claim, issue or matter in such a Proceeding by dismissal without prejudice, shall be deemed to be a successful result as to such claim, issue or matter.”

(Id. § 1 [c].)

In the Delaware 225 action, members of the Board sought an order declaring invalid stockholder consents delivered to TradingScreen by Philippe, and validating the actions taken by

the Board on May 10, 2016. The stockholder consents purported to remove and replace Pierre Schroeder as a director. The Board actions at the May 10, 2016 meeting were the Board's placement of Philippe on paid leave from his position as CEO and appointment of Schroeder as interim CEO. By notice dated June 16, 2016, Philippe and Patrick Buhannic irrevocably withdrew the shareholder consents and consented to the Board's May 10, 2016 actions. The Buhannics' notice stated that their withdrawal of their claims mooted each of the claims asserted in the Delaware 225 action, but that they reserved "all rights concerning the alleged factual assertions and conclusions on which the Board based its May 10 decisions and actions." (Aff. of Peter Neger, Ex. 1.) By order dated June 27, 2016, the Delaware 225 action was dismissed as moot "with prejudice as to the Buhannic Defendants." (Aff. of Joshua Levin-Epstein, Ex. 14.) The order further provided: "Nothing in this Order (i) affects any claim of any party to factually and legally challenge the assault allegations as described in the Complaint² and to dispute the accuracy of the Board's conclusion that key employees had lost confidence in Mr. Buhannic and wanted a change in leadership, or (ii) or affects any rights under" specified agreements. (Id.)

The court holds that Philippe is not entitled to advancement of expenses incurred in the Delaware 225 action because that action was brought against him not in his capacity as an officer or director, but rather as a stockholder. As defendants correctly contend, the claims were based on the Buhannics' stockholder consents and rights they asserted as stockholders. Philippe's expenses thus do not qualify as expenses incurred "by reason of his Corporate Status." (Agreement §§ 4, 12 [a].)

In the alternative, advancement of expenses incurred in the Delaware 225 action is not appropriate, because the action has been finally dismissed and Philippe was not successful in

² These allegations are discussed *infra* at 4.

whole or in part. Review of the complaint in the Delaware 225 action reveals that it was brought to challenge the effectiveness of the Buhannics' stockholder consents and to establish that the Board had the requisite quorum at the May 10, 2016 meeting to take action. No assertion is made that the Board filed any claim in the action seeking a determination as to the underlying merits of its suspension of Philippe. Although the complaint in the Delaware 225 action alleges that TradingScreen's outside counsel conducted an investigation into an assault by Philippe prior to his suspension (Delaware 225 action Complaint, ¶¶ 14-15), the claim seeking a declaration of the validity of the Board's actions was not based on the truth of the assault allegation, but merely on the presence of a quorum. (*Id.*, ¶¶ 43-46, 48-50.) Philippe's reservation of rights regarding subject matter that did not serve as the basis for the claims of any party to the action, does not qualify under the terms of the Agreement as a "dismissal without prejudice" of a claim or issue in the Proceeding. Philippe is therefore not entitled to indemnification for the Delaware 225 action.

Although the issue of success ordinarily need not be considered in determining a party's entitlement to advancement, as opposed to indemnification, of expenses incurred in litigation, the Delaware 225 action is now finally resolved. Plaintiffs urge the court not to reach the question of plaintiffs' success in that action, but have had the opportunity to address, and have addressed, the issue. Under these circumstances, the court cannot ignore that there has been no resolution of any claim in the Delaware 225 action in Philippe's favor which could constitute success within the meaning of the indemnification provision. The court may not properly order advancement of expenses that Philippe would ultimately be required to return.

With respect to the SpreadZero Investigation, defendants contend that the court should not order advancement of expenses because Philippe failed to comply with the provisions of the

Agreement requiring him to provide TradingScreen with a statement reasonably evidencing the expenses incurred, an undertaking to repay advanced expenses, and reasonable assurances that he will reimburse expenses if required. Philippe asserts that he has provided invoices evidencing expenses and an undertaking. The only undertaking in the record by its terms refers to expenses incurred in the Delaware 225 action or another action on the same claims. (Levin-Epstein Aff., Ex. 12.) The branch of the motion seeking advancement of expenses incurred in connection with the SpreadZero Investigation will accordingly be denied without prejudice to a new motion seeking this relief. Any new motion must be supported by an undertaking, which specifically relates to the SpreadZero Investigation, and by reasonable assurances of reimbursement. The motion must also annex copies of statements evidencing expenses reasonably incurred by Philippe for the SpreadZero Investigation, including invoices for attorney's fees and other costs, which clearly indicate the fees and costs were incurred for the SpreadZero Investigation, and not for some other matter.

Philippe also seeks advancement of expenses incurred and to be incurred in connection with the instant action, both for the action as a whole and this motion in particular. As this action was brought by Philippe, without the approval of the Board, Philippe is not entitled to advancement or indemnification of expenses incurred in litigating this action as a whole. (Agreement § 8 [quoted in full above].) The court rejects plaintiffs' contention that the instant action was not initiated by Philippe because it is in effect a "challenge" to allegations in the Delaware 225 action or a "defensive action" responding to those allegations. (Pls.' Memo. In Supp. at 6.) As discussed above, the Delaware 225 action did not involve consideration of the substantive grounds for Philippe's termination as CEO, whether based on an assault or otherwise.

The court reaches a different conclusion as to Philippe's claim for advancement of expenses on this motion. This claim is governed by section 6 (d) of the Agreement, which provides:

"In the event that Indemnitee, pursuant to this Section 6, seeks a judicial adjudication of his rights under, or to recover damages for breach of, this Agreement, or to recover under any directors' and officers' liability insurance policies maintained by the Company, the Company shall pay on his behalf, in advance, any and all expenses (of the types described in the definition of Expenses in Section 12 of this Agreement) actually and reasonably incurred by him in such judicial adjudication, regardless of whether Indemnitee ultimately is determined to be entitled to such indemnification, advancement of expenses or insurance recovery."

Thus, by the terms of the Agreement, notwithstanding this court's finding that Philippe is not entitled to reimbursement of expenses incurred in all of the matters for which advancement or indemnification is sought, Philippe is entitled to advancement and indemnification of expenses reasonably incurred in seeking a judicial adjudication of his rights under the Agreement.

As discussed above, however, Philippe has not complied with the procedural requirements for advancement pursuant to section 4 of the Agreement. In particular, he has not provided an undertaking to repay advanced expenses, reasonable assurances that he will reimburse expenses if required, or statements and invoices clearly evidencing his expenses. The branch of the motion for advancement of expenses incurred on this motion will be denied without prejudice to a new motion. Any new motion must be supported by an undertaking which specifically relates to this action, and by reasonable assurances of reimbursement. The motion must also annex copies of statements evidencing expenses reasonably incurred by Philippe, including invoices for attorneys' fees and other costs which clearly indicate the costs were incurred in seeking judicial adjudication of his rights to advancement or indemnification, and not for some other matter.

Finally, the court holds that the Agreement does not support plaintiffs' application to require TradingScreen to post a bond to secure indemnified expenses. That branch of the motion will accordingly be denied.

It is accordingly hereby ORDERED that the motion of plaintiff Philippe Buhannic for advancement of expenses is granted to the extent that the branches of the motion for (1) advancement of expenses incurred or to be incurred in connection with the SpreadZero Investigation, and (2) for advancement of expenses incurred on this motion, and to be incurred on the new motion authorized pursuant to this decision, are denied without prejudice to the new motion; and it is further

ORDERED that the remaining branches of plaintiffs' motion are denied with prejudice.

Dated: New York, New York
December 12, 2017



MARCY FRIEDMAN, J.S.C.