People v Moore
2012 NY Slip Op 33509(U)
September 13, 2012
Supreme Court, New York County
Docket Number: 401004/2012
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 401004/2012
PEOPLE OF THE STATE OF
vs.
MOORE, JOHN C.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 9/13/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: .... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

-against-

Index No. 401004/12

JOHN C. MOORE, ROBERT HINKLE, MICHAEL LAKOW, DIANA PIKULSKI, HAYWARD R. PRESSMAN, LESLIE PRIGGEN, JOHN S. RAINEY, MARGARET SANTULLI, AND THOROUGHBRED RETIREMENT FOUNDATION, INC.,

Defendants.

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ANIL C. SINGH, J.:

Plaintiff, the Attorney General of the State of New York (NYAG) brings this action against the Thoroughbred Retirement Foundation (TRF) and its current and former directors (the Individuals). TRF is a Type B not-for-profit corporation incorporated under section 402 of the New York Not-for-Profit Corporation Law (N-PCL), with its principal place of business in Saratoga, New York. Founded in 1983, and having twenty-five facilities across the United States, TRF is the world's oldest, and largest, equine-care organization for retired racehorses. The stated mission of the TRF is "to provide a retirement home or homes for [T]horoughbred race horses with a racing record which because of age, disability or for other reasons are no longer suitable for racing." Ostrager Aff., Ex. B, Certificate of Incorporation of TRF, ¶ 3.

Generally, the NYAG purports that TRF failed to properly oversee and manage the organization's operations and finances. With regard to operations, the NYAG alleges that TRF accepted more Thoroughbreds than it could afford to support, failed to provide adequate funding

to its boarding facilities, was driven into insolvency by its directors, who raided the funds of TRF, and caused the neglect, suffering, and death, of various horses in its herd. With regard to finances, the NYAG alleges that the TRF board of directors (the Board) has engaged in a series of financially irresponsible transactions, borrowing to pay off existing debt and invading TRF's restricted endowment fund, thereby further damaging TRF's ability to fulfill its charitable purpose of protecting Thoroughbreds from neglect and mistreatment.

The NYAG seeks a judgment: (i) removing TRF's current directors, the Individuals, for cause and permanently barring them from reelection to the Board; (ii) requiring the Individuals to account for violating their fiduciary and statutory duties by causing the neglect of TRF horses and engaging in financial transactions that benefitted the Individuals and violated the restrictions on TRF's endowment; (iii) enjoining TRF and its directors and officers from accepting additional horses into its herd without the Court's approval; (iv) enjoining TRF and its directors and officers from invading or otherwise misusing the endowment fund; and (v) appointing a temporary receiver to administer TRF's assets, pending the reconstitution of its board of directors.

The complaint contains five causes of action for: (1) removal of the Individuals, for cause, under N-PCL § 706; (2) violation of the duty of care by the Individuals under N-PCL §§ 717 and 720; (3) violation of duty of loyalty by defendants Moore and Rainey under N-PCL §§ 717 and 720; (4) violation of duties in the administration of charitable assets by all defendants under N-PCL §§ 513, 553, and 720; and (5) improper administration of a not-for-profit corporation, against defendants Moore, Hinkle, Lakow, Pikulski, Pressman, Priggen, Santulli, and TRF in violation of New York Estates, Powers and Trusts Law (EPTL) § 8.1-4.

The defendants now move, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7) to dismiss the complaint based upon documentary evidence and for failure to state a cause of action upon which relief can be granted.

On this motion to dismiss pursuant to CPLR 3211, the court accepts the facts as alleged in the complaint as true, accords the NYAG the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone,* 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634 (1976). Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *See e.g. Heaney v Purdy,* 29 NY2d 157 (1971). Under CPLR 3211 (a) (7), this court may freely consider affidavits submitted by the NYAG to remedy any defects in the complaint. *Rovello, supra,* at 635; *see generally Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Nonetheless, unsupported speculation is insufficient to defeat a motion to dismiss. *See Mark Hampton v Bergreen*, 173 AD2d 220, 220 (1st Dept 1991) (inherently incredible, unsupported, or flatly contradicted facts, as well as allegations consisting of bare legal conclusions are not entitled to the presumption of truth and the benefit of every favorable inference).

The defendants argue that the complaint should be dismissed because it is based on falsehoods and distortions that are directly contradicted by documentary evidence. To wit, the defendants claim that the horses in the TRF herd are healthy and enjoy excellent care, recent evaluations by professional veterinarians attest to the excellent health of virtually every horse in the herd, the TRF has taken action to address the size of its herd, and the directors have diligently ensured the propriety and prudence of every financial transaction at issue in the complaint. What

is more, defendants argue, the NYAG has not alleged or proven bad faith or self-dealing on the part of the Individuals, and, as such, the business judgment rule protects the decisions of the Board and the Individuals.

BUSINESS JUDGMENT RULE

As a threshold matter, the defendants argue, relying on *People v Grasso* (11 NY3d 64, 71 [2008]), that even if the complaint were not entirely dependent upon outright falsehoods and exaggerations, it would still fail to state a claim for which relief may be granted because the allegations contained therein fail to overcome the presumptions of the business judgment rule. This is argument is misguided.

"The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings." *40 W. 67th St. v Pullman*, 100 NY2d 147, 153 (2003) (citations omitted). However, the rule does not extend to insulate improper acts by board members. *See e.g. Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 540 (1990); *Smukler v 12 Lofts Realty*, 178 AD2d 125 (1st Dept 1991); *see also Fletcher v The Dakota*, __ AD3d __, 948 NYS2d 263, 267 (1st Dept 2012) ("arbitrary or malicious decision making or decision making tainted by discriminatory considerations is not protected by the business judgment rule"). Moreover, the business judgment rule, per se, "generally applies in commercial contexts [and] does not apply to . . . entities organized under the N-PCL." *Consumers Union of U.S. v State of New York*, 5 NY3d 327, 373 (2005).

More accurately, "a standard of review that is *analogous to the business judgment rule* applied by courts to determine challenges to decisions made by corporate directors" (*Matter of Levandusky*, 75 NY2d at 537 [emphasis added]) is apropos in the not-for-profit setting. This is

because "[d]irectors and officers [are required to] discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." N-PCL § 717 (a).

In *Grasso* (11 NY3d at 69), the court makes clear that it is dismissing only the four *nonstatutory causes of action,* which were viewed as an attempt to circumvent the statutory fault-based claims available under the N-PCL. The Court of Appeals focused on dismissal of the common-law causes of action, which were brought based upon an application of the *parens patriae* doctrine.[1] Allowing these claims would have bypassed the intent of the Legislature. Here, *there are no common-law causes of action whatsoever.* As such, while *Grasso* technically notes that "the Legislature has provided directors and officers with the protections of the business judgment rule [via N-PCL § 717]" (11 NY3d at 70), reliance on *Grasso* to discharge any proper statutory review of duties under N-PCL, is malapropos.

The defendants also argue that the business judgment rule prevents second-guessing of decisions made in good faith by corporate directors and officers (*see* N-PCL § 717 [a]), and since the complaint fails to allege bad faith, it must be dismissed. However, the complaint clearly states "the Individual Defendants have *failed to discharge their duties as directors of TRF in good faith* and . . . among other things . . . entered into a commercial financing agreement . . . that benefitted individual directors . . ." Complaint, ¶ 85 (emphasis added); *see also* ¶¶ 82, 89.

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[1]"*Parens patriae* is a common-law doctrine regarding standing. It allows the state to bring an action to prevent harm to its sovereign interests, such as the health, safety, comfort, and welfare of its citizens. To invoke the doctrine, the [Attorney General] must show: (1) a quasi-sovereign interest in the public's well-being; (2) distinct from that of a particular private party; and (3) injury to a sufficiently substantial segment of the population." *People v Merkin*, 26 Misc 3d 1237(A), 2010 NY Slip Op 50430 (U), *9 (Sup Ct, NY County 2010).

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Defendants further rely upon *People v Lawrence* (74 AD3d 1705, 1707 [4th Dept 2010]) for the proposition that "officers of a not-for-profit corporation are protected by the business judgment rule[, and] liability pursuant to section 720 (a) (1) 'requires a showing that the officer or director lacked good faith in executing his [or her] duties [citation omitted].'" The court has no quibble with the proposition that a showing of lack of good faith is necessary for liability under N-PCL § 720. However, in *Lawrence* the procedural stance was one for summary judgement. *See Lawrence*, 74 AD3d at 1707 (on the motion for summary judgment "respondents met their initial burden of establishing that the payments at issue were either authorized or made by respondents in good faith and that petitioner failed to raise a triable issue of fact in opposition [citation omitted]"). Here, in contrast, the defendants are moving to dismiss the complaint before answering.

Moreover, where, as here,

> there is a question as to whether the . . . directors breached their fiduciary duty, it cannot be presently argued that [the] directors engaged in the type of actions that would shield them from judicial inquiry under the business judgment, or analogous, rule. Accordingly, it is premature to assert that: (1) the business judgment rule bars plaintiffs' claims; and (2) a court is not able to inquire into the actions of [the] directors.

Consumers Union of U.S., 5 NY3d at 327; *see also Sergeants Benevolent Assn Annuity Fund v Renck*, 19 AD3d 107 (1st Dept 2005) (actions sounding in breach of fiduciary duty involve fact questions unsuited to resolution upon a motion to dismiss).

The complaint, which has not been answered, comprises allegations of statutory violations, failure by the Individuals to discharge their duties as directors of TRF in good faith, self dealing, and breach of fiduciary duties. As such, the motion to dismiss the complaint based

upon application of the business judgment rule is denied.

MOTION TO DISMISS BASED UPON DOCUMENTARY EVIDENCE (CPLR 3211 [A] [1])

Defendants move to dismiss based upon extensive affidavit information, and assertions made which purportedly belie the allegations of the NYAG. More specifically, the defendants offer the affidavit of their counsel, a report prepared by TRF, and numerous veterinary evaluations in support of their motion.

The defendants conclude that: (i) TRF currently provides care for more than 1000 horses at 25 facilities across the United States; (ii) the total herd count has decreased by some 23% since 2006 as a result of a concerted effort by the TRF Board; and (iii) TRF's horses are in excellent health. Unfortunately, this information in no way satisfies the requirements of CPLR 3211 (a) (1).

"[P]rinted materials [such as] as letters, summaries, opinions, and/or conclusions of the defendants . . . do not reflect an out-of-court transaction and are not 'essentially undeniable.' Thus, they are not 'documentary evidence' within the intendment of CPLR 3211 (a) (1)." *Fontanetta v John Doe I*, 73 AD3d 78, 87 (2nd Dept 2010) (citation omitted). Only where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" may this motion be granted. *Id.* at 83-84; *see also American Indus. Contr. Co. v Travelers Indem. Co.*, 42 NY2d 1041, 1043 (1977) (affidavits may be used in support of a motion to dismiss the complaint for legal insufficiency under CPLR 3211 [a] [7], but not based upon documentary evidence under CPLR 3211 [a] [7]).

Instead, defendants may use the type of evidence provided only by way of CPLR 3211 (c), in essence asking the court to treat the motion as one for summary judgment under CPLR

3212, or by answering the complaint and then making a CPLR 3212 motion directly. *Fontanetta*, 73 AD3d at 87. The motion to dismiss based upon documentary evidence is denied.

MOTION TO DISMISS THE COMPLAINT FOR LEGAL INSUFFICIENCY (CPLR 3211 [A] [7])

On a motion made pursuant to CPLR 3211 (a) (7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party which is based on testimony only. *Sokol v Leader*, 74 AD3d 1180, 1181 (2nd Dept 2010). Despite this, affidavits may be examined with the purpose of curing the complaint. *Rovello*, 40 NY2d at 636; *Sokol*, 74 AD3d at 1181-82. If affidavits and other evidentiary material are considered, the inquiry is "whether the proponent of the pleading has a cause of action, not whether he has stated one." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). "Questions of credibility are for the trier of facts and may not be determined on a motion to dismiss." *People v Richards*, 128 AD2d 387, 388 (1st Dept 1987); *accord Matter of Janice M. v Terrance J.*, 96 AD3d 482, 483 (1st Dept 2012).

Here, the defendants have not carried their burden of showing that the NYAG has failed to state a cause of action. The NYAG has brought causes of action based upon: (i) N-PCL §112 (right of NYAG to maintain an action or special proceeding to remove a director of a corporation for cause under N-PCL 706); (ii) N-PCL §706 to remove and bar the Individuals from reelection for a period fixed by the court; (iii) N-PCL §§ 717 and 720 for violation of the duties of care and loyalty; (iv) N-PCL §§ 513, 553, and 720 for violations of duties in the administration of TRF assets; and (v) EPTL § 8-1.4 for improper administration of TRF. The defendants have not addressed the right of the NYAG to bring *any* of these claims, but instead call upon the court to dismiss the action based upon the credibility of their witnesses. The only oblique reference to

any of these statutes is the clearly erroneous assertion by the defendants that the NYAG has not alleged a lack of good faith, as required under N-PCL § 717. However, the complaint is replete with such allegations. *See* Complaint ¶¶ 5, 9, 10, 11, 40, 67, 74-80, 82, 85, and 89. The motion to dismiss for failure to state a claim is also denied.

Accordingly, it is hereby

ORDERED that the motion of defendants to dismiss the complaint based upon documentary evidence, pursuant to CPLR 3211 (a) (1), and for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), are denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 320, 80 Centre Street, on NOVEMBER 7TH, 2012, at 9:30AM/[illegible].

Dated: Sept. 13, 2012

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE