Glaubach v Slifkin
2015 NY Slip Op 32476(U)
December 2, 2015
Supreme Court, Queens County
Docket Number: 702987/2015
Judge: Marguerite A. Grays

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

x

FELIX GLAUBACH, derivatively on behalf of PERSONAL TOUCH HOLDING CORP.,

Plaintiff(s)

-against-

DAVID SLIFKIN, TRUDY BALK, ROBERT MARX, JOHN L. MISCIONE, JOHN D. CALABRO, LAWRENCE J. WALDMAN, ROBERT E. GOFF, JACK BILANCIA, ANTHONY CASTIGLIONE, NANCY ROA, and JOSEPHINE DIMAGGIO.

Defendant(s)

x

Index Number 702987 2015

Motion Date September 3, 2015

Motion Cal. Number 68

Motion Seq. No. 4

The following papers numbered 1 to 8 read on this motion by defendant Robert Marx for, *inter alia*, an Order pursuant to CPLR §3211(a)(1) and (7) dismissing the fifth and eleventh causes of action in the complaint, and on this cross-motion by plaintiff Felix Glaubach for an Order permitting him to serve a supplemental summons and amended complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5
Memoranda of Law	6-8

Upon the foregoing papers it is ordered that this motion is denied. The cross-motion is granted. The plaintiff shall serve the supplemental summons and amended complaint within twenty (20) days of the service of a copy of this Order with Notice of Entry.

The Court notes initially that the plaintiff cross-moved in this action for an Order permitting him to serve a supplemental summons and an amended complaint and that the

cross-motion has merit (*see*, CPLR§ 3025[b]; *See, Holchendler v. We Transport, Inc.*, 292 AD2d 568; *St. Paul Fire & Marine Ins. Co. v. Town of Hempstead*, 291 AD2d 488; *Whitney-Carrington v. New York Methodist Hosp.*, 289 AD2d 326). Although the plaintiff served his cross-motion in response to CPLR §3211 dismissal motions directed toward the original complaint, the instant motion by defendant Marx may still be determined. " The filing of an amended pleading does not automatically abate a motion to dismiss that was addressed to the original pleading; the moving party has the option to decide whether its motion should be applied to the new pleading." (*Sage Realty Corp. v. Proskauer Rose LLP*, 251 AD2d 35; *see, Sobel v. Ansanelli,* 98 AD3d 1020; *49 West 12 Tenants Corp. v. Seidenberg*, 6 AD3d 243). In the case at bar, defendant Marx did not withdraw his CPLR §3211(a) motion, and the Court will apply it to the amended complaint.

Plaintiff Felix Glaubach and defendant Robert Marx established a health care business known as Personal Touch in 1974. Personal Touch provides home health care services, including care by home health aides, social services, and physical therapy. Glaubach served as the President of the Company and Chief Executive Officer until 2011. Defendant David Slifkin, a 4.5% shareholder in the company, became the Chief Executive Officer in 2011.Marx serves as the Executive Vice-President, General Counsel, and Special Director of the company. Personal Touch did business through over twenty-five S corporations having their own separate articles of incorporation and by-laws.

The complaint alleges that from 2008 to 2011, a period during which Glaubach was incapacitated, Slifkin caused Personal Touch to pay him undeclared and undisclosed income in excess of $500,000 and that he hid this unauthorized income by classifying it as the reimbursement of educational expenses which he never actually incurred. Slifkin also allegedly caused Personal Touch to pay unauthorized income to defendant Trudy Balk (the Vice-President of Operations), Marx, and others, which he allegedly disguised as reimbursement for educational expenses. Among the others allegedly receiving unauthorized income falsely classified as reimbursement for educational expenses were defendant Anthony Castiglione (Vice-President and Treasurer) who received at least $88,968, defendant Jack Bilancia who received at least $70,000, defendant Nancy Roa (Director of Human Resources) who received at least $17,500, and defendant Josephine DiMaggio (Executive Assistant) who received at least $10,000. The complaint further alleges that Marx, Slifkin, and Balk have conspired to freeze Glaubach out of company affairs.

The fifth cause of action alleges: "Marx's actions of accepting payment of reimbursement of educational expenses and other monies he did not incur constitutes a breach of his fiduciary duty to the company ***." The eleventh cause of action alleges: "Slifkin and Marx's ultra vires acts of barring Glaubach from Personal Touch's office constitutes a breach of their fiduciary duty."

The Court notes initially that under New York law, issues concerning the internal affairs of a corporation are decided in accordance with the law of the state of incorporation (*see*, *Hart v. Gen. Motors Corp.*, 129 AD2d 179). "The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders – because otherwise a corporation could be faced with conflicting demands." (*Edgar* v. MITE Corp., 457 US 624, 645; *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 AD3d 422). Moreover, where New York is the forum state, "New York's choice-of-law principles determine whether a particular issue ***is substantive or procedural ***. Under New York choice-of-law rules, matters of procedure are governed by the law of the forum ***. On the other hand, New York choice-of-law rules provide that substantive issues such as issues of corporate governance, including the threshold demand issue, are governed by the law of the state in which the corporation is chartered ***." (*Lerner v. Prince*, 119 AD3d 122, 127-28 [First Dept., 2014]).

In regard to the fifth cause of action, the amended complaint adequately alleges that Glaubach properly made a demand upon the Board before asserting the claim derivatively. Under both New York law (*see*, BCL § 626; *Taylor v. Wynkoop*, 132 AD3d 843) and Delaware law (*see*,. Del. Ch. Ct. R 23.1; *Int'l Painters v. Cantor Fitzgerald, L.P.*, 132 AD3d 470; *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106), in general, Glaubach was required to make a demand upon the board that it take action to remedy the wrong that is the subject of the fifth cause of action. While Delaware law applies to this issue (*see*, *Int'l Painters v. Cantor Fitzgerald, L.P.*, 132 AD3d 470; *Lerner v. Prince*, *supra*), under both New York and Delaware law, paragraph twenty of the amended complaint adequately alleges that he made a demand upon the board to take action concerning the allegedly bogus educational expenses. In regard to the eleventh cause of action, the amended complaint adequately alleges facts which show that a demand upon the board would have been an exercise in futility (*see*, *Int'l Painters v. Cantor Fitzgerald, L.P.*,*supra*; *Ocelot Capital Mgmt., LLC v. Hershkovitz*, 90 AD3d 464).

Defendant Marx also argues for the dismissal of the fifth cause of action on the ground that while plaintiff Glaubach brought a derivative action on behalf of Personal Touch Holding Corp., the allegedly unauthorized payments to Marx were made by an S corporation, Personal Touch Home Care of NY, Inc. This argument lacks merit because of the "double derivative " rule. "Any discussion of a double derivative action must be with reference to the baseline standard derivative action. To illustrate, in a standard derivative action, a shareholder brings a lawsuit asserting a claim belonging to a corporate entity in which the shareholder owns shares (Corporation A). A double derivative action, in contrast, involves two entities: Corporation A (the Corporation whose claim is being asserted), and Corporation

B, which owns or controls Corporation A." (*Lambrecht v. O'Neal*, 3 A.3d 277, 281 [Del. 2010]). "[A] a double derivative suit is one brought by a shareholder of a parent corporation to enforce a claim belonging to a subsidiary that is either wholly owned or majority controlled. Normally, such a claim is one that only the parent corporation, acting through its board of directors, is empowered to enforce. Cases may arise, however, where the parent corporation's board is shown to be incapable of making an impartial business judgment regarding whether to assert the subsidiary's claim. In those cases a shareholder of the parent will be permitted to enforce that claim on the parent corporation's behalf, that is, double derivatively." (*Lambrecht v. O'Neal, supra*, 282.) Glaubach, a shareholder of Personal Touch Holding Corp., may bring a double derivative action to enforce a claim belonging to the S corporation.

In regard to the eleventh cause of action, the plaintiff alleges that "Slifkin and Marx's ultra vires acts of barring Glaubach from Personal Touch's office constitutes a breach of their fiduciary duty." "[T]he defense of ultra vires conduct goes to the validity of an action taken by a de jure corporation which is beyond the powers granted in its corporate charter ***" (*Lorisa Capital Corp. v. Gallo*, 119 AD2d 99, 113). While the defendants' action may not have been ultra vires, the intent of the eleventh cause of action to plead a breach of fiduciary duty is clear, and the eleventh cause of action is sufficient to survive this CPLR §3211(a) motion. The complaint, read in its entirety, sufficiently alleges that defendant Marx, in violation of his fiduciary duties as a shareholder, officer, and employee has engaged in acts which conflict with the interests of Personal Touch and which violate duties of good faith and loyalty owed to the corporation (*see, Deblinger v. Sani-Pine Products Co.*, 107 AD3d 659; *Weiser LLP v. Coopersmith*, 51 AD3d 583; *Don Buchwald & Associates, Inc. v. Marber-Rich*, 11 AD3d 277; *CBS Corp. v. Dumsday*, 268 AD2d 350), including maliciously barring plaintiff Glaubach from his office. Whether the eleventh cause of action can withstand a motion for summary judgment is a matter not taken into consideration here (*see, Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34).

The motion by defendant Marx lacks merit and is thus denied its entirety.

Dated: DEC 02 2015

J.S.C.