Ryba v Levy
2018 NY Slip Op 32188(U)
September 4, 2018
Supreme Court, Kings County
Docket Number: 524188/17
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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SIMCHA RYBA, individually and derivatively on behalf of LERYNA REALTY LLC, BLUE SPOT MANAGEMENT CORP., & THUNDERBALL MARKETING INC.,

Plaintiffs, Decision and order

- against - Index No. 524188/17

ms #1/2

ELY LEVY, JOE LEVY, NISSIM LEVY, MORRIS NAHMOUD, LERYNA REALTY LLC, BLUE SPOT MANAGEMENT CORP., THUNDERBALL MARKETING INC., & THE LERYNA FOUNDATION,

Defendants, September 4, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complaint on various grounds pursuant to CPLR §3211. The plaintiff opposes the motion. Papers were submitted by both parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff is a one fifth owner of Leryna Realty LLC, Blue Spot Management Corp., and Thunderball Marketing Inc. The defendants, Ely Levy, Joe Levy, Nissim Levy and Morris Nahmoud each own one fifth of each corporation, thus comprising the ownership of the three entities. The plaintiff has alleged the defendants, who were the directors of the entities, diverted funds from the entities to themselves. Specifically, plaintiff alleges an insurance settlement in the amount of two million dollars to Leryna and Thunderball were diverted to the

defendants. Moreover, plaintiff asserts the profits from a sale of property in Kings County was not disbursed to the plaintiff. The complaint alleges six causes of action. First, plaintiff alleges a breach of fiduciary duty committed by the four defendants. Second, plaintiff alleges a derivative breach of fiduciary duty committed by the four defendants. Third, the plaintiff asserts a direct claim against the four defendants for conversion. The fourth claim seeks an accounting. The fifth claim alleges a violation of Business Corporation Law §720 arguing the defendants violated their management duties to Thunderball. The sixth cause of action alleges a violation of Business Corporation Law §720 arguing the defendants violated their management duties to Blue Spot. The defendants have moved seeking to dismiss the complaint arguing it has no merit. The plaintiff opposes the motion.

Conclusions of Law

"It is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions" (Westinghouse Elec. Corp. v. New York City Tr. Auth., 82 NY2d 47, 603 NYS2d 404 [1993], citing, Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am., 37 NY2d 91 [1975]). Arbitration has long been shown to be an effective "means of

conserving the time and resources of the courts and the contracting parties" (Nationwide Gen. Ins. Co, supra); see, also, Westinghouse Elec. Corp., supra). It is well settled that a party cannot be subject to arbitration absent a clear and unequivocal agreement to arbitrate (see, Waldron v. Goddess, 61 NY2d 181, 473 NYS2d 136 [1984]). Thus, where an arbitration clause encompasses all disputes between the parties and is unambiguous such arbitration clause will be enforced (Stoll America Knitting Machinery Inc., v. Creative Knitwear Corp., 5 AD3d 586, 772 NYS2d 863 [2d Dept., 2004]). In contrast, a clause will be held ambiguous if key terms are not defined in the agreement (Spataro v. Hirschhorn, 40 AD3d 1070, 837 NYS2d 258 [2d Dept., 2007]).

In this case the arbitration clause states that "any dispute…shall…be submitted to, and settled by, arbitration" (see, Operating Agreement, dated May 1, 2004, ¶20). The plaintiff argues this clause is "equivocal in that a party may request arbitration, but does not have to do so" and that "this contingent possibility of arbitration does not constitute an unambiguous agreement to arbitrate" (see, Plaintiff's Memorandum of Law in Opposition, page 11). However, there is nothing equivocal about the clause. As noted "any dispute" must be submitted to arbitration. The plaintiff argues that Neisloss v.

Gomez Associates Inc., 16 Misc3d 1141(A), 851 NYS2d 59 [Supreme Court Nassau County 2007] demands the arbitration clause in this case be deemed unenforceable. In that case the court ruled upon an arbitration clause that stated that when a dispute arose any party "may" choose arbitration. The court concluded the word "may" connoted equivocation and that consequently arbitration was not mandatory. In this case, however, the arbitration clause states any party "shall" submit to arbitration when a dispute arises. The word "shall" generally denotes mandatory discretionless obligations (see, National Association of Home Builders v. Defenders of Wildlife, 551 US 644, 127 S.Ct. 2518 [2007]). Therefore, a party maintains no discretion whether to submit to arbitration, rather each party shall, meaning must, submit to arbitration. Consequently, the arbitration clause is enforceable and the motion seeking to dismiss the complaint as to defendants Ely Levy, Joe Levy, Nissim Levy, Morris Nahmoud only concerning Leryna Realty Corp., is granted.

Concerning the motion to dismiss, it is well settled that "[a] motion to dismiss made pursuant to CPLR 3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank

and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

First, there is no merit to the argument all claims concerning Thunderball must be dismissed based upon the certificate of incorporation. That certificate states that "the personal liability of directors to the corporation or its shareholders for damages for any breach of duty in such capacity is hereby eliminated except that such personal liability shall not be eliminated if a judgement or other final adjudication adverse to such director establishes that his acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled or that his acts violated Section 719 of the Business Corporation Law" (see, Certificate of Incorporation of Thunderball Marketing Inc., ¶6). The defendants argue that since there have been no

judgements or other adverse determinations against any of the defendants all claims regarding Thunderball must be dismissed.

However, there is nothing in the language of the Certificate which requires a judgement prior to initiating a cause of action. Indeed, if that was the intent of the Certificate then it would be impossible to ever raise claims or initiate a lawsuit since the existence of a final judgement would always be lacking. This obvious circular anomaly would shield the directors from any legal issues, an obvious legal impossibility. Therefore, the Certificate merely states the truism that no director can be held liable for breach of any duty unless such determination is made and a final judgement is obtained.

Further, Business Corporation Law §626(c) states that no derivative lawsuit may be commenced unless the complaint alleges "with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making the effort" (id). As the Supreme Court noted, for a stockholder to sue derivatively "he must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court" (see, Hawes v. City of Oakland, 104 US 450, 14 Otto 450 [1881]).

The defendants argue the plaintiff failed to comply with

that provision and that consequently the plaintiff has no standing to pursue the lawsuit. The plaintiff counters that specific evidence such notice would have been futile has been presented.

To succeed upon an assertion that notice would have been futile and hence not required specific facts must be presented that the individuals at issue were self-interested in the transactions (see, Bansbach v. Zinn, 1 NY3d 1, 769 NYS2d 175 [2003]. Thus, the plaintiff must establish that if a demand would have been filed with the Board of Directors they could not have exercised independent and disinterested business judgement (id). Thus, the individual defendants will be considered incapable of being disinterested if facts support a personal benefit to them regarding the transaction being challenged (id). In that instance the business judgement rule is inapplicable and demand futility is established.

In this case, the complaint alleges that defendants had financial interests in the transactions that comprise the causes of action. Thus, demand would obviously have been futile.

The defendants argue the standard for demand futility has not been met since the futility has not been presented with sufficient particularity. However, particularity governs the totality of the futility and as long as such futility can be

discerned by the court then the particularity will naturally suffice. Thus, where the directors are accused of self-dealing then obviously futility has been presented (see, Soho Snacks Inc., v. Frangioudakis, 129 AD3d 636, 13 NYS3d 31 [1st Dept., 2015]).

Thus, considering the six causes of action, the court must now analyze whether such claims are direct or derivative. In Serino v. Lipper, 123 AD3d 34, 994 NYS2d 64 [1st Dept., 2014] the court explained that to distinguish a derivative claim from a direct claim the court must engage in two inquiries. First, whether any harm was suffered by the corporation or an individual stockholder and whether the corporation or the individual stockholder would receive the benefit of any recovery. As the court stated "if there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action…On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand" (id).

In this case, the plaintiff has alleged individual harms. Specifically, the plaintiff has alleged that he was entitled to a distribution from the proceeds of the Kings County property that was sold which he alleges he never received (see, Amended Verified Complaint, ¶¶18-21). While of course the plaintiff will

be required to present evidence to succeed upon that claim, at this stage of the litigation, the plaintiff has presented a harm that is different from that of the corporation. The failure to make distributions where required are direct claims (see, Gjuraj v. Uplift Elevator Corp., 110 AD3d 540, 973 NYS2d 172 [1st Dept., 2013]). Therefore, the motion seeking to dismiss the first cause of action is denied.

Since the court has concluded that demand futility has been presented any motion seeking to dismiss the second cause of action or the fourth cause of action are consequently denied.

The third cause of action is for conversion. It is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see,

Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred. The plaintiff has adequately presented claims for conversion. Consequently, the motion seeking to dismiss this cause of action is denied.

The last two causes of action allege violations of Business Corporation Law §720 which generally allows an action brought against directors or officers of a corporation for violations of fiduciary duties, the disposition of corporate assets, waste and other violations. The defendants argue these causes of action must be dismissed because first the statute cannot require disgorgement of assets and second because the allegations are not specific. Regarding specificity, that is not a basis in which to dismiss the complaint. Further discovery will broaden the scope of the allegations. Further, in Gillette v. Sembler, 34 MIsc3d 1220(A), 950 NYS2d 491 [Supreme Court Suffolk County 2012] the court held that monetary damages was valid pursuant to BCL §720. Thus, at this stage of the litigation, these claims are valid and the motion seeking to dismiss them is denied.

Thus, the motion seeking to dismiss all the causes of action are hereby denied. The motion seeking to compel arbitration

concerning Leryna Realty is granted.

So ordered.

ENTER:

DATED: September 4, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC