Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC
2019 NY Slip Op 32039(U)
July 5, 2019
Supreme Court, New York County
Docket Number: 653468/2015
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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WIMBLEDON FINANCING MASTER FUND, LTD., Index No: 653468/2015

Plaintiff, **DECISION & ORDER**

-against-

WESTON CAPITAL MANAGEMENT LLC et al.,

Defendants.

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JENNIFER G. SCHECTER, J.:

Defendants Leonard de Waal and Arie Bos move to dismiss the portions of the fifth and sixth causes of action asserted against them in the second amended complaint (the SAC).[1] Plaintiff Wimbledon Financing Master Fund, Ltd. (Wimbledon) opposes the motion. The motion is granted.

Familiarity with this action is assumed (*see Wimbledon Financing Master Fund, Ltd. v Weston Capital Mgmt. LLC*, 2017 WL 3024259 [Sup Ct, NY County July 17, 2017] [the 2017 Decision], *mod* 160 AD3d 596 [1st Dept 2018] [dismissing duplicative unjust enrichment claim and otherwise affirming entirety of the 2017 Decision]).[2] In the 2017 Decision, the court dismissed, without prejudice, Wimbledon's claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty against de Waal and Bos based on their conduct as Gerova directors (*see* 2017 WL 3024259, at *19). The reason

[1] The motion also was made by defendant Marshall Manley but he has since settled with Wimbledon (*see* Dkt. 1553).

[2] Capitalized terms that are not defined have the same meaning as in the 2017 Decision.

for the dismissal was because, ordinarily, under governing Cayman Islands law, directors do not owe fiduciary duties to shareholders (as opposed to the company) and because absent an applicable exception, Cayman Islands law precludes derivative actions (*see id.*, accord *Davis v Scottish Re Group Ltd.*, 30 NY3d 247, 252 [2017]). Wimbledon was given leave to replead an exception to these rules (*see Davis v Scottish Re Group Ltd.*, 160 AD3d 114, 116 [1st Dept 2018] [the four narrow exceptions to the Cayman Islands rule are "(1) if the conduct infringed on the shareholder's personal rights; (2) if the conduct would require a special majority to ratify; (3) if the conduct qualifies as a fraud on the minority; or (4) if the conduct consists of ultra vires acts"]).

Instead of bringing a derivative claim, Wimbledon amended its pleading and asserted direct claims purportedly based on the duty to provide sufficient information to shareholders (*see Peskin v Anderson*, [2000] 1 BCLC 372, 2000 WL 1841707, accord *Wilson v Dantas*, 29 NY3d 1051, 1066 [2017]). This "sufficient information duty," however, "is not a duty of loyalty, which would require the directors to subordinate their interests to the shareholders' interests" (*Davis v Scottish Re Group Ltd.*, 159 AD3d 528, 529 [1st Dept 2018]). Rather, the duty only arises if and when directors choose to apprise shareholders of business matters and requires only that their disclosures be clear and not misleading (*see id.*). This is somewhat akin to (although arguably more limited than) the well recognized direct rights of shareholders to receive material disclosures on matters on which the shareholders have input (*see In re J.P. Morgan Chase & Co. Shareholder Litig.*, 906 A2d 766, 772 [Del 2006]).

In the SAC (Dkt. 1201), Wimbledon pleads that de Waal and Bos, as board members, caused Gerova to make five categories of false statements and omissions to Wimbledon:

> 1. Misrepresentations that Gerova would have a board of experienced reinsurance executives, including Manley and his former colleagues Michael Kantor and Dennis Dammerman, when Kantor and Dammerman had not agreed to join the board and Manley planned to depart after only a few months.
>
> 2. Misrepresentations that Gerova's 'core asset' was $115 million in cash to acquire a reinsurance business, when it had no such asset and indeed was functionally insolvent with no reinsurance business.
>
> 3. Concealment of related-party transactions, including the nature of the related-party Rineon transaction and the profit de Waal would reap from it.
>
> 4. Concealment of Galanis' extensive involvement in Gerova and his misuse of company assets to benefit himself.
>
> 5. Concealment of the irregular trading activity generated by Galanis' market manipulation scheme (Dkt. 1559 at 15).

As de Waal and Bos correctly aver, Wimbledon already has a claim for being fraudulently induced to acquire Gerova equity in reliance on their alleged misrepresentations. This court has already found, as affirmed by the Appellate Division, that Wimbledon has stated a direct claim for fraud against de Waal and Bos (*see* 160 AD3d at 597). Of course, prior to making its investment in Gerova, Wimbledon cannot have been in a fiduciary relationship with Gerova's directors. Wimbledon's fiduciary duty claims thus must be exclusively predicated on misconduct post-dating its investment

and for which the remedy is distinct from loss of the securities that it provided to acquire Gerova stock.

That is not the case with the first two categories of misrepresentations. If the misrepresentations occurred after Wimbledon became a shareholder, they could not have harmed Wimbledon because, at that point, Wimbledon had already given up its securities. The harm would have already been done and is otherwise compensable on Wimbledon's fraudulent inducement claim.

As for the latter three categories of misrepresentations, while "Wimbledon does not purport to bring a derivative claim" (Dkt. 1559 at 16), it alleges nothing more than a classic derivative claim for breach of the fiduciary duties of loyalty and care. That Wimbledon nominally labels these claims as direct is of no moment. The relevant inquiry as to whether a claim is direct or derivate turns on whether the shareholder suffered a harm independent of the company, not the label one places on the claim (*Yudell v Gilbert*, 99 AD3d 108, 114-15 [1st Dept 2012]). Here, every Gerova shareholder was equally harmed by the alleged concealment, none of which is alleged to have uniquely affected Wimbledon. Though Wimbledon was uniquely harmed by giving up its securities based on the alleged misrepresentations about the nature of Gerova, after it did so and once it became a Gerova shareholder, it was not uniquely harmed by the illicit way Gerova was operated (*see Serino v Lipper*, 123 AD3d 34, 41 [1st Dept 2014] ["The lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder"]). To be sure, if New York or Delaware law governed,

Wimbledon may well have been able to plead demand futility to assert these classically derivative claims. But by choosing to invest in a company incorporated in the Cayman Islands, Wimbledon cannot complain about the foreseeable restrictions on its ability to seek redress for misfeasance committed by the company's directors.[3]

Accordingly, it is ORDERED that the motion by de Waal and Bos to dismiss the SAC's fifth (breach of fiduciary duty) and sixth (aiding and abetting breach of fiduciary duty) causes of action is granted, and such claims are hereby dismissed only as against them.

Dated: July 5, 2019

ENTER:

Jennifer G. Schecter, J.S.C.

[3] The court will not speculate about whether exceptions to the prohibition on bringing derivative actions may apply since Wimbledon unequivocally disclaimed the intent to prosecute derivative claims in this action.