

Toribio v Feldor Billiards, Inc.
2020 NY Slip Op 33533(U)
October 27, 2020
Supreme Court, New York County
Docket Number: 153384/2014
Judge: Jennifer G. Schechter
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

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INDEX NO. 153384/2014

VICENTE TORIBIO, JENNIFER ARRIGO, JENNIFER BECHEM, BRENDAN BURKE, LIAM BUSH, RIGDZIN COLLINS, JENNY CRUZ, PENELOPE CRUZ, RENEE CRUZ, VANESSA CRUZ, ALEXIS DAVID, QUERLIM FRANCO, MIEKO GAVIA, ALBERT GOOLD, CHARLES GOOLD, STEPHANIE HENRIQUEZ, KERRI KENDER, KAMILA NAREWSKA, LILY NUNEZ, JOSE PEREZ, ANGEL PIMENTEL, STEPHANIE PON, ALEXIS RUBIN, ALLAN RUBENSTEIN, ANTHONY THAMBYNAYAGAM, HUI-SHURN YONG,

MOTION SEQ. NO. 010, 011, 014

**DECISION + ORDER ON
MOTION**

Plaintiffs,

- v -

FELDOR BILLIARDS, INC. D/B/A FAT CAT BILLIARDS,
NOAH SAPIR, CHARLES BERG,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 262-266, 440, 444-453, 457, 462, 565-574

were read on this motion for DISCLOSURE OF TAX RETURNS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 306-309, 413-439, 441, 454, 458, 517-578, 580

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 528-536, 538, 576-577, 579, 581

were read on this motion to AMEND CROSS-CLAIMS.

Motion sequence numbers 010, 011 and 014 are consolidated for disposition.

Defendant Noah Sapir, f/k/a Noah Lesser moves to compel defendant Charles Berg to produce his unredacted tax returns for the years 2008 through 2017 (Seq. 010). Sapir also moves for leave to amend his cross-claims against Berg (Seq. 014). Berg opposes both motions and moves, pursuant to CPLR 3212, for an order dismissing all cross-claims

asserted against him by Sapir and granting him summary judgment on the first and second cross-claims, asserted derivatively on behalf of defendant Feldor Billiards Inc. (Fat Cat) against Sapir (Seq. 011). Sapir opposes Berg's motion.

Unredacted Tax Returns

Sapir's motion to compel the production of Berg's unredacted tax returns (Seq. 010) is denied. Sapir argues that Berg improperly diverted corporate funds to third parties without any legitimate business purpose and that he therefore should be afforded access to Berg's personal tax returns because "they are likely to show further evidence of self-dealing and additional breaches of his fiduciary duties to Feldor Billiards" (Dkt. 263 at 2). Sapir's request is a fishing expedition. Provided that the tax returns were produced disclosing all information, entries and schedules related to Feldor, as was represented by Berg's counsel on the record (Dkt. 586 at 53-54), nothing more is required. Sapir failed to make the strong showing of necessity required to compel disclosure of the unredacted returns (*see Demurjian v Demurjian*, 184 AD3d 505 [1st Dept 2020]).

Sapir's Motion to Amend and Berg's Motion for Summary Judgment

Sapir's motion for leave to file his amended complaint (Seq. 014) is granted. Berg shows no prejudice by allowing Sapir to amend his causes of action to be derivative rather than direct. There is also no demonstrable prejudice to Berg in allowing Sapir to amend to add a derivative cross-claim for corporate waste regarding payments to the widow of Berg's former business partner, Dora Sabella. The bulk of the operative facts are in Berg's own possession. Berg shall, however, be afforded the opportunity to depose any expert witness that Sapir intends to offer at trial. The court will set a schedule for Sapir to submit

a pre-trial expert report, Berg will be able to offer a rebuttal expert report, and both sides' experts will be deposed.

Berg's motion for summary judgment is denied (Seq. 011).

Having granted Sapir's motion for leave to amend to assert his cross-claims derivatively on behalf of Fat Cat, Berg's motion for summary judgment dismissal is denied as moot.

Summary judgment on Berg's first and second cross-claims against Sapir, asserted derivatively on behalf of Fat Cat, is also denied. In his first cause of action, Berg contends that the compensation policy employed by Fat Cat between July 2008 and July 2014 was illegal, and that Sapir had a fiduciary duty to ensure whether it was in compliance with law before creating it. Under the shareholders' agreement, however, Berg was responsible for maintaining tip records and retaining opinion counsel (Dkt. 426 [Shareholders' Agreement] at 2) regardless of whose idea it was initially to switch the employee compensation system. Berg's claim, moreover, may well be barred by unclean hands (Dkt. 469 at 72-73 [Sapir Dep. 71:25-72:9] [Berg informed Sapir that the system was contrary to the Labor Law beginning in 2009 yet it went unchanged for years]).

In his second cause of action, Berg contends that Sapir's refusal to agree to settle plaintiffs' labor law claims constituted corporate waste. Berg fails to demonstrate, as a matter of law, that Sapir's refusal to enter such settlement agreements was the product of bad faith, self-dealing or conflicted decision-making by Sapir and not poor business judgment (*see In re Kenneth Cole Prods., Inc.*, 27 NY3d 268, 274 [2016]). Summary judgment in favor of Berg is therefore denied. Accordingly, it is


ORDERED that the motion of defendant Noah Sapir to compel Charles Berg to produce his unredacted personal tax returns is denied; and it is further

ORDERED that the motion of defendant Charles Berg for summary judgment is denied; and it is further

ORDERED that the motion of defendant Noah Sapir to file his propose amended cross-claims is granted, and the proposed amended cross-claims (Dkt. 528) are deemed served on Charles Berg as of the date of this decision and order, and defendant Charles Berg shall respond to the amended cross-claims within 21 days of this decision and order; and it is further

ORDERED that by November 10, 2020, the parties shall e-file and email the court (mrand@nycourts.gov) a Word version of a stipulation with deadlines for supplemental expert discovery on Sapir’s newly added cross-claim against Berg for corporate waste that requires all such expert discovery to be completed by January 15, 2021.

10/27/2020
DATE


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JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER