| **Axen v Yankelevich** |
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| 2021 NY Slip Op 31069(U) |
| April 5, 2021 |
| Supreme Court, Kings County |
| Docket Number: 501329/21 |
| Judge: Leon Ruchelsman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
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ABIE AXEN, individually, in his capacity as the Executor of the Estate of Leon Axen and derivatively on behalf of M.G. Medical Supply, Inc.,
Petitioners-Plaintiffs,

Decision and order

- against -

Index No. 501329/21

ALEKSANDR YANKELEVICH and YEVGENIY KACHKOVSKIY a/k/a EUGENE KACHKOVSKIY,
Respondents-Defendants,

-and-

M.G. MEDICAL SUPPLY, INC.,
Nominal Respondent-Defendant

April 5, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendant M.G. Medical Supply has moved pursuant to CPLR §3211 seeking to dismiss all the causes of action of the complaint. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

During 2014 Leon Axen the owner of M.G. Medical Supply Inc., transferred fifty percent ownership to defendant Aleksandr Yankelevich. Leon passed away in January 2019 and his son Abie Axen assumed his father's role in the corporation. Abie has now instituted this lawsuit seeking dissolution under the common law and pursuant to statute. The petition also seeks an accounting, alleges breach of a fiduciary duty both derivatively and personally. The basis for these claims are allegations contained

in the petition that Yankelevich improperly paid his relatives from corporate funds, utilized corporate funds for his own personal needs and improperly managed the corporation. The defendant has filed this motion to dismiss arguing the petition has no merit and cannot sustain any cause of action. The plaintiff opposes the motions arguing the claims have merit.

Conclusions of Law

"[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" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [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]).

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 defendant argues 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 petition alleges that defendant Yankelevich had material interests in the issues that comprise

the causes of action, namely the treatment of the plaintiff as an equal partner of the company and expenses that were not in the interests of the corporation. Thus, demand, if Yankelevich maintains the status of a board member, 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]). The nature of the claims against the defendant Yankelevich reveal that such demand would have been futile. Thus, demand futility has been established.

Next, 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). Thus, where the alleged injury affects all shareholders not just the plaintiff then the action is only derivative and not direct (Vaughan v. Standard General L.P., 154 AD3d 581, 63 NYS3d 44 [1st Dept., 2017]).

The petition alleges that "the Corporation's bank records reflect that Alex has been paying his personal expenses from the Corporation's accounts, including thousands of dollars spent at Russian bathhouses, hotels, casinos, the Christian Louboutin boutique, expensive restaurants, concert venues, and Broadway theaters" (see, Petition, ¶73). Those allegations, which are accepted true for purposes of a motion to dismiss, are claims asserted by the corporation not any individuals. Likewise, whether any impropriety occurred concerning any shareholder meeting is a wrong that may be asserted by the corporation in a derivative manner.

However, the plaintiff also alleges individual claims, namely, that he was not paid proper distributions. The defendants seek to dismiss these claims on the grounds any decisions were protected by the business judgement rule. The petition, however, specifically alleges that the decision to

provide far less compensation was not the result of any sound business decision but rather was intentionally and specifically done to harm the plaintiff. While further discovery will necessarily narrow these issues, at this juncture the plaintiff has alleged valid causes of action of individual harms.

Further, it is well settled that when considering the dissolution of a corporation "the issue is not who is at fault for a deadlock, but whether a deadlock exists" (Matter of Kaufmann, 225 AD2d 775, 640 NYS2d 569 [2d Dept., 1996]). Thus, ignoring the conduct or fault of any particular party "the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs" (Matter of Dream Weaver Inc., 70 AD3d 941, 895 NYS2d 476 [2d Dept., 2010]). Therefore, when there is really no dispute that a deadlock exists then a hearing is not required and dissolution should be granted (In re Dream Weaver Realty, 70 AD3d 941, 895 NYS2d 476 [2d Dept., 2010]).

In this case there is no dispute that a deadlock exists and the parties cannot work together in one corporation. The petition surely alleges such deadlock sufficient to survive a motion to dismiss.

Concerning the causes of action alleging breach of fiduciary duty and aiding in such breach, the basis for these causes of

action is that the defendant Yankelevich and defendant Eugene Kachkovskiy the office manager failed to act in the best interests of the plaintiff and breached fiduciary duties owed to the plaintiff.

To succeed on a claim for breach of a fiduciary duty, a plaintiff must establish the existence of the following three elements: (1) a fiduciary relationship existed between plaintiff and defendant, (2) misconduct by the defendant, and (3) damages that were directly caused by the defendant's misconduct (Kurtzman v Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007], see, Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989]).

There can be little dispute that a fiduciary relationship existed since Yankelevich assumed the role of managing the corporation and acted as its owner. Therefore, Yankelevich had a duty to the remaining shareholder the plaintiff and to the corporation as a entity. The defendant insists that no such fiduciary duty is owed to the plaintiff individually. However, as already explained, the allegations of the petition assert breaches to both the corporation and the plaintiff. At this stage of the proceeding the petition has sufficiently alleged such breaches. Thus, assuming a fiduciary relationship existed (see, Pokoik v. Pokoik, 115 AD3d 428, 982 NYS2d 67 [1st Dept., 2014]), the second element of misconduct must now be examined. Misconduct by a fiduciary constituting a breach of duty can take

one of two forms, either breach of loyalty or breach of care (Higgins v. New York Stock Exch., Inc., 10 Misc3d 257, 806 NYS2d 339 [Supreme Court New York County 2005]). Generally, a breach of loyalty will be established where plaintiff can show that defendant participated on both sides of a transaction. "This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" Birnbaum, supra). The complaint alleges that defendant committed "acts of self-dealing" by essentially utilizing corporate funds for personal uses. Those allegations clearly raise questions whether there was a breach of a fiduciary duty.

Lastly, it is well settled that "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d 261, 503 NYS2d 381 [2d Dept., 1986]). Clearly, the petition has alleged sufficient facts this cause of action is available.

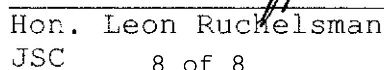
Therefore, based on the foregoing, the motion seeking to dismiss any of the claims is hereby denied.

So ordered.

ENTER:

DATED: April 5, 2021
Brooklyn NY

Hon. Leon Ruchelsman
JSC





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