

Jacobsen v 474 3rd Owners Corp.
2021 NY Slip Op 32729(U)
December 20, 2021
Supreme Court, Kings County
Docket Number: Index No. 522484/21
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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WALTER JACOBSEN and ROBERT JACOBSEN,
individually and derivatively in their
capacity as shareholders of 474 3RD OWNERS
CORP. and 474 3RD OWNERS CORP.,
Plaintiff,

Decision and order

- against -

Index No. 522484/21

474 3RD OWNERS CORP., KENNETH HAINES,
MARTIN COX and JULIETTE MOIR,
Defendants,

December 20, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the plaintiff's complaint on the grounds it fails to state any cause of action. The plaintiff has cross moved requesting attorney's fees. The motions have been opposed respectively. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the complaint, the plaintiffs own twenty five percent of the outstanding shares of 474 3rd Owners Corp., which is a residential cooperative corporation at 474 3rd Avenue in Kings County. The plaintiff, Walter Jacobsen is a member of the five member board of directors. This derivative action was commenced alleging the board has engaged in improper acts including reducing the board to a three member committee, failing to provide financial statements and failing to conduct regular meetings. The complaint alleges derivative causes of action for

breach of fiduciary duty, inspection of corporate books and records, and a cause of action for injunctive relief. The defendants have now moved seeking to dismiss the complaint arguing no breaches occurred and the board of directors acted pursuant to the business judgement rule and that in any event the plaintiff does not allege any derivative claims.

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]).

The business judgement rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgement in the lawful and legitimate furtherance of corporate purposes" (see, Deblinger v. Sani-pine Products Co., Inc., 107 AD3d 659, 967 NYS2d 394 [2d Dept.,

2013]). The plaintiff counters that the defendants failed to engage in five primary activities on behalf of the corporation. Namely, the defendants failed to "(i) call an annual shareholder meeting for the election of Directors; (ii) hold regular monthly Board of Directors meetings including all members of the Board of Directors of the Corporation, (iii) provide all Board members, including W. Jacobsen, with all corporate financial and operational records of the Corporation... (iv) require the Executive Committee, if any, to report to the Board of Directors monthly and obtain approval of the Board for all actions taken by the Executive Committee; (v) obtain and distribute annual financial statements to the shareholders for the years 2019, 2020 and annually thereafter" (see, Affirmation in Opposition, ¶ 3). Indeed, these complaints were first raised in a demand letter sent by Walter Jacobsen dated July 30, 2021. In that letter, Mr. Jacobsen complained about the above noted issues. However, there is no allegation presented why the business judgement rule should not shield the board of directors in the exercise of their duties. Thus, generally, actions of a board of directors is insulated by the business judgement rule (Business Corporation Law §715(h)(2)). It is true that the business judgement rule does not apply where the directors involved have a personal stake in a transaction (Marx v. Akers, 88 NY2d 189, 644 NYS2d 121 [1996]). Thus, the business judgement rule does not create a

presumption of legality, rather, as an interested director the director bears the burden of good faith and fairness (Alpert v. 28 Williams Street Corp., 63 NY2d 557, 483 NYS2d 667 [1984]). As the court noted in In re Croton River Club Inc., 52 F3rd 41 [2d Cir. 1995]) "it is black-letter law that when a corporate director or officer has an interest in a decision, the business judgement rule does not apply" (id). However, there were no decisions that were made by board in this case where they personally benefitted. Further, there is no evidence the board engaged in abusive or oppressive conduct. The evidence presented demonstrates that the board faithfully followed the provisions of the by-laws. However, the fact the plaintiffs remain unsatisfied with some of the decisions pursuant to those by-laws does not mean the board committed any wrongdoing. Therefore, the court must defer to the decisions of the corporate directors and officers (see, 40 West 67th Street v. Pullman, 100 NY2d 147, 760 NYS2d 745 [2003]).

Further, 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 derivative and not direct (Vaughan v. Standard General L.P., 154 AD3d 581, 63 NYS3d 44 [1st Dept., 2017]).

In this case the alleged injuries committed by the corporation only affect Mr. Jacobsen. First, there is no dispute that all shareholders have received all financial information and that all necessary meetings were conducted. This is not merely a question of fact which requires further discovery on a motion to dismiss. Rather, the plaintiff admits to receiving all the information sought in the complaint. Next, any issues that "Walter Jacobsen has been systematically excluded from any participation in management of the affairs of the Corporation, which is now run by a three member committee instead of a five member board" and that "(v) Walter Jacobsen has not been provided with current documents or information he requests or prompt access to information notwithstanding his entitlement as a board member and a shareholder" (see, Demand Letter, dated July 30, 2021) are clearly individual claims that are not viable in this derivative action. Indeed, the entirety of the complaint as well

as the accompanying materials demonstrates this lawsuit concerns personal claims Mr. Jacobsen maintains against the board of directors. Those claims might be real, however, they are surely not derivative in nature. Therefore, the court need not explore the nature of these claims since they are only personal.


It should be noted that pursuant to Section 9 of the corporation's by-laws "the Board of Directors may by resolution appoint an executive Committee and such other committees as it may deem appropriate, each to consist of three or more directors of the Corporation. Such committees shall have and may exercise such of the powers of the Board in the management of the business and affairs of the Corporation during the intervals between the meetings of the Board as may be determined by the authorizing resolution of the Board of Directors..." (id). Thus, there can be no real challenge to the composition of any executive committee in any event.

Therefore, based on the foregoing the motion seeking to dismiss the complaint is granted. The cross-motion seeking attorney's fees is consequently denied.

So ordered.

ENTER:

DATED: December 20, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC