SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

CORNER FURNITURE DISCOUNT CENTER, INC. and 2901 FURNITURE OUTLET, INC.,

Plaintiffs,

-against-

GARY SAPIRSTEIN,

Defendant.

Index No. 30522/2018E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.:

This is an action for, *inter alia*, breach of fiduciary duty, fraud and conversion. Plaintiffs move to dismiss defendant's first counterclaim for involuntary judicial dissolution, pursuant to CPLR 3211 (a) (2), and for dismissal of certain of defendant Gary Sapirstein's affirmative defenses.

The court has gleaned the following facts from the pleadings and the documents submitted by the parties in connection with the instant motion: Ronald Stechler (RS) and defendant Sapirstein founded a retail furniture business in 1984; RS owned 75% of the stock and Sapirstein had 25%. In 2008, RS brought his son Eric Stechler (ES) into the business, and in 2012, ES was given a 24% interest by RS, reducing RS' share to 51%. The business grew until it consisted of four entities, including plaintiffs and the two proposed "counterclaim defendants," Rongar Realty of N.Y., Inc. and 2926 Realty Corp., (the four, collectively, "PCC companies"). Claiming that he embezzled funds from the business, on August 9, 2018, RS and ES removed Saperstein from the board of directors, and as an officer, and from participating in any corporate operations.

In his Answer, Sapirstein counterclaimed against plaintiffs and improperly interposed counterclaims against non-parties Rongar Realty of N.Y., Inc. and 2926 Realty Corp., and purports to add them to the action as "counterclaim defendants" (see CPLR 3019[d]). Sapirstein seeks, by

way of counterclaim, judicial dissolution of the PCC companies pursuant to Business Corporation Law § 1104-a, and to recover a sum of money from plaintiff Corner Furniture Discount Center for credit card expenses incurred in connection with his work on behalf of Corner Furniture. Saperstein denies plaintiffs' accusation of theft or fraud and justifies his self-help of business funds by claiming that he was "only attempting repayment and offset for the many sums taken from [him] by Stechler." (Response No. 11 to Demand for Bill of Particulars.)

Plaintiffs move for dismissal averring that the court does not have jurisdiction of the subject matter of this action because the counterclaims do not comply with the requirements of the governing statutes. On a motion pursuant to CPLR 3211, a Complaint must be liberally construed (CPLR 3026), the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged constitute any cause of action recognized under New York law (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 [2011]; *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99, 99-100 [1st Dept 2004]; *see Amsterdam Hospitality Group, LLC v Marshall Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]).

Pursuant to Business Corporation Law § 1104-a, shareholders representing 20% or more of the votes of all outstanding shares of a corporation may present a petition of dissolution on the ground that the directors or those in control of the corporation have been guilty of oppressive actions toward the complaining shareholders (*see Matter of Kemp & Beatley (Gardstein)*, 64 NY2d 63 [1984]; *Muller v Silverstein*, 92 AD2d 455 [1st Dept 1983]). In the counterclaim, Sapirstein alleges that the board of directors' decision to terminate him was oppressive conduct and that ES' mismanagement contributed to corporate waste (see *Fedele v Seybert* (250 AD2D 519, 522 [1st Dept 1998]).

A proponent of dissolution must comply with Business Corporation Law §§ 1105 and 1106. Business Corporation Law § 1105 provides: "A petition for dissolution shall specify the section or sections of this article under which it is authorized and state the reasons why the corporation should be dissolved. It shall be verified by the petitioner or by one of the petitioners." Section 1106 provides a detailed procedure:

> (a) Upon the presentation of such a petition, the court shall make an order requiring the corporation and all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than four weeks after the granting of the order, why the corporation should not be dissolved....
> (b) A copy of the order to show cause shall be published as prescribed therein, at least once in each of the three weeks before the time appointed for the hearing thereon, in one or more newspapers, specified in the order, of general circulation in the county in which the office of the corporation is located at the date of the order.
> (c) A copy of the order to show cause shall be served upon the state tax commission and the corporation and upon each person named in the petition, or in any schedule provided for in paragraph (a), as a shareholder, creditor or claimant, except upon a person whose address is stated to be unknown, and cannot with due diligence be ascertained by the corporation. The service shall be made personally, at least ten days before the time appointed for the hearing, or by mailing a copy of the order, postage prepaid, at least twenty days before the time so appointed, addressed to the person to be served at his last known address.
> (d) A copy of the order to show cause and the petition shall be filed, within ten days after the order is entered, with the clerk of the county where the office of the corporation is located at the date of the order....
> (e) Publication, service and filing provided for in this section shall be effected by the corporation or such other persons as the court may order.

There must be strict compliance with the procedures set forth. In *Matter of WTB Props.* (291 AD2d 566 [2nd Dept 2002]), where the petitioner's Order to Show Cause did not provide for publication, was not published, and was not served upon the New York State Department of Taxation and Finance, the Court held that the lower court could not order the dissolution before the statutory requirements were met (*see Matter of Gould Erectors & Rigging, Inc.*, 119 AD3d 1039, 1040 [3rd Dept 2014]; *La Sorsa v Algen Press Corp.*, 105 AD2d 771, 772 [2nd Dept 1984].). In *Matter of*

Cunningham & Kaming (75 AD2d 521, 522 [1st Dept 1980]), the Court stated that the consequence of the failure to comply with Business Corporation Law § 1106, specifically to publish and properly serve the order to show cause, "was that the court acquired no jurisdiction and respondent was not prejudiced."

In his opposition to the motion, Sapirstein attempts to respond to plaintiffs' procedural defect arguments by submitting a Petition to judicially dissolve the four PCC companies, listing the reasons for his Petition, including that he was summarily terminated and locked out of all corporate functions without a severance package, and that plaintiffs are guilty of oppressive actions. Sapirstein contends that since the holdings of PCC companies consist of real estate, he can only be made whole by dissolution of the PCC companies and the sale of the assets.

Sapirstein's efforts to correct his defective first counterclaim with a Petition and declaration in support, fail as they do not comply with Business Corporation Law §§ 1105 and 1106 (*see Fedele v Seybert*, 250 AD2d at 520). Absent from Sapirstein's submission are an Order to Show Cause, a Verified Petition, and proof of publication (*La Sorsa v Algen Press Corp., supra*, at 772). Sapirstein fails to plead a cause of action in compliance with the dictates of Business Corporation Law §§ 1105 and 1106 (CPLR 3211 [a] [2]; *Matter of Finando (Sunsource Health Prods.)*, 226 AD2d 634, 635 [2nd Dept 1996]).

With respect to Sapirstein's affirmative defenses, CPLR 3211 (b) provides: "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The standard of review is the same as that for a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action. It is plaintiff's heavy burden to show that Sapirstein's defense is without merit as a matter of law (*see Pugh v New York City Hous. Auth.*, 159 AD3d 643, [1st Dept

2018]; *Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015]; Mazzei v Kyriacou, 98 AD3d 1088, 1088-1089 [2nd Dept 2012]).

The second and third affirmative defenses are related. The second affirmative defense alleges that plaintiffs' claims are barred for lack of standing because plaintiffs are not the proper parties for the reason that the claim is derivative in nature and must be brought by a shareholder. The third affirmative defense alleges that plaintiffs' claim is barred because of the failure to join a necessary party, the shareholder, since the claim is derivative in nature.

The Court in *Wolf v Rand* (258 AD2d 401, 403 [1st Dept 1999]) provides the following analysis:

> Although plaintiff sued individually as well as derivatively, this case actually seeks vindication of her rights as a shareholder, and recovery of corporate assets and profits diverted from her in that status. Her standing is that of a shareholder, suing other shareholders who converted corporate assets and profits, entitling her to sue only derivatively (*Glenn v Hoteltron Sys.*, 74 NY2d 386, 392 [1989]; *Paradiso & DiMenna v DiMenna*, 232 AD2d 257 [1st Dept 1996]). Even where the corporation is closely held, and the defendants might share in the award, the claims belong to the corporation, and damages are awarded to the corporation rather than directly to the derivative plaintiff (supra). The purpose of the rule is to prevent impairment of the rights of creditors of the corporation whose claims may be superior to those of the innocent shareholder (*Glenn v Hoteltron Sys., supra*).

In this action, the harm alleged is said to be caused by Sapirstein against the corporation, not the individual shareholders.

In *West View Hills v Lizau Realty Corp.* (6 NY2d 344, [1959]), the Court explained: "Absent a provision in the by-laws or action by the board of directors prohibiting the president from defending and instituting suit in the name of and in behalf of the corporation, he must be deemed, in the discharge of his duties, to have presumptive authority to so act. Under these circumstances, the within action was properly instituted by the president *in the name of the corporation*, in the exercise of his implied

authority to protect and preserve the interest of the plaintiff corporation." (emphasis added; *see also*, *Executive Leasing Co. v Leder*, 191 AD2d 199, 200 [1st Dept 1993].)

Thus, this action was properly brought and maintained by RS in the name of the corporation.

Sapirstein insists that RS and ES are necessary parties because they controlled the family business. CPLR 1001 (a) provides in part: "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." In this action, since the relief sought is not related to the individual shareholders but the entity, the shareholders will not be inequitably affected by a judgment. Saperstein's claim that the suit must be brought derivatively is unavailing. Inasmuch as it is permissible for shareholders to bring an action in the name of the corporation, Sapirstein's affirmative defense of lack of standing is without merit, as is his contention that RS and ES as shareholders are necessary parties because the claim is derivative in nature.

Accordingly, plaintiffs' motion to dismiss is granted to the extent that defendant's first counterclaim for involuntary judicial dissolution, and the second and third affirmative defenses are dismissed.

The foregoing constitutes the Decision and Order of the court.

Dated: June 14, 2019

Rubén Franco, J.S.C.

HON. RUBÉN FRANCO