SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

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LOUANN LARSEN, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST A, and the LARSEN 2021 FAMILY TRUST, SUBTRUST C; KATERINA VOUMVOURAKIS, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST A, and the LARSEN 2021 FAMILY TRUST, SUBTRUST B; and LYDIA LARSEN, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST B, and the LARSEN 2021 FAMILY TRUST, SUBTRUST C, as trustees and derivatively on behalf of POWER COOLING, INC. and RELIANCE MACHINING, INC.,

Plaintiffs, Index # 512169/2022

- against - July 18, 2022

LAUREN LARSEN,

Defendant,

and

POWER COOLING, INC., and RELIANCE MACHINING, INC.,

Nominal Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The defendant Lauren Larsen has moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiffs have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, the nominal defendant corporations, which are engaged in cooling and heating services were owned by Lloyd Larsen. On December 1, 2002 Lloyd placed 51% of the shares of common stock of the corporations into a trust and his daughter Lauren, the defendant herein, was named as

trustee along with a non-party. Further, Lloyd and his wife and Lauren executed an agreement wherein they were the only shareholders with voting rights. Lloyd passed away in 2011 and Lauren was gifted 29% of the company and purchased another 20% from her mother, leaving her with 49% of the company. In 2021 the 2002 Trust was reformed into a new trust with three subdivisions, two (Subtrusts A and B) maintaining 19.40% each and Subtrust C maintaining 9.4%). The 2002 trust still maintained 2.75%. The trustees of Subtrusts A, B and C are Lloyds other three children, the plaintiffs herein, Louann, Lydia and non-party Linnea and other non-parties.

The Complaint alleges that since Lloyd's death Lauren has mismanaged the corporations, failing to provide distributions and paying her children salaries and benefits for providing no work. Further, the Complaint alleges the defendant has diverted income from the corporation for her own personal gain. The plaintiffs sought books and records of the corporations and such request has been refused. The Complaint alleges causes of action for a failure to provide books and records, derivative claims for breach of duty of care and care, corporate waste and unjust enrichment and direct claims for breach of duty, for a constructive trust and claims for the breach of the shareholder agreement, declaratory relief and an accounting.

The defendant has now moved seeking to dismiss the complaint

on the grounds, essentially, that it fails to allege any valid causes of action. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Federal National Mortgage Association v. Grossman, 205 AD3d 770, 165 NYS2d 892 [2d Dept., 2022]). 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, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

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 defendants argue the plaintiffs failed to comply with that provision and that consequently the plaintiffs have no standing to pursue the lawsuit. The plaintiffs counter 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 plaintiffs 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 defendant will be considered incapable of being disinterested if facts support a personal benefit to her regarding the transactions being challenged (id). In that instance the business judgement rule is inapplicable and demand futility is established.

In this case, the complaint alleges the defendant had material interests in the issues that comprise the causes of action, namely the diversion of funds and misappropriation of

funds. Thus, demand would obviously have been futile. Indeed, where a director is 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]). Thus, demand futility has been established.

Turning to the motion seeking to dismiss the cause of action for statutory books and records, pursuant to Business Corporation Law §624(e) the petitioners are entitled to "an annual balance sheet and profit and loss statement for the preceding fiscal year, and, if any interim balance sheet or profit and loss statement has been distributed to its shareholders or otherwise made available to the public, the most recent such interim balance sheet or profit and loss statement" (id). It is well settled that the right to inspect corporate books and records under the common law can only be asserted when a corporate shareholder is acting in good faith and has established that the inspection is for a proper purpose (Matter of Crane Co. v. Anaconda Co., 39 NY2d 14, 382 NYS2d 707 [1976]). "A hearing must be held on the issue of good faith where the corporation raises a substantial question of fact as to the shareholder's good faith and motives" (see, Troccoli v. L & B Contract Industries, Inc., 259 AD2d 754, 687 NYS2d 400 [2d Dept., 1999]). Of course, where no legitimate question of fact is presented challenging the good faith basis of the shareholder

seeking the request, then a hearing or any discovery is not required (Goldstein v. Acropolis Gardens Realty Corp., 116 AD3d 776, 982 NYS2d 922 [2d Dept., 2014]). There has been no question raised the request for books and records was made for any purpose other than good faith to discover and support the plaintiff's allegations. Therefore, the motion seeking to dismiss the first cause of action is denied.

Concerning the remaining causes of action, other than the issue of demand futility which has been addressed, the defendant asserts two reasons why the complaint should be dismissed. First, that the plaintiffs are guilty of receiving the same unearned benefits from the corporations that they accuse the defendant of receiving. Second, by receiving such benefits as well they have financially harmed their non-party sister Linnea and are thus "inherently compromised" (see, Memorandum of Law in Support, page 9).

The defendant cites to Steinberg v. Steinberg, 106 Misc2d 720, 434 NYS2d 877 [Supreme Court New York County 1980] for the proposition that a shareholder with a conflict of interest cannot initiate a derivative action. However, in that case the conflict did not concern allegations of equal and improper looting of the corporation. Rather, it concerned the fact the plaintiff only filed the derivative lawsuit to gain leverage in a matrimonial action. Thus, the court concluded the plaintiff did not

represent the interests of the other shareholders and did maintain capacity to sue. However, the Second Department did not adopt this broad understanding of capacity. Thus, in Dukas v. Davis Aircraft Products Co., Inc., 129 Misc2d 846, 494 NYS2d 632 [Supreme Court Suffolk County 1985] the court disagreed with Steinberg (supra) and held that capacity to sue only concerns a legal disability such as infancy or lunacy and not the reasons for such derivative suit. The Second Department adopted this approach (Dukas v. Davis Aircraft Products Co., Inc., 123 AD2d 304, 506 NYS2d 203 [2d Dept., 1986]). Indeed, in Corcoran v. Corcoran, 192 AD2d 503, 596 NYS2d 86 [2d Dept., 1993] the court held that a shareholder "had a right to bring and maintain this derivative action regardless of his personal motive for so doing" (id).

Moreover, the mere fact there are allegations that the plaintiff's likewise received funds for work they did not perform and hence do not deserve does not mean the allegations are made in bad faith. Rather, the defendant can surely file counterclaims against the plaintiffs for such alleged improprieties (see, Savitt v. Greenberg, Traurig LLP, 126 AD3d 506, 5 NYS3d 415 [1st Dept., 2015]). Moreover, the degree of wrongdoing, as between the plaintiffs and defendants are questions that must be explored. This is especially true in this case where the defendant was charged with making all financial

decisions (Savitt, supra). Thus, while such counterclaims might be particularly out of joint since the defendant, as the manager of the corporations approved such expenditures, nevertheless, the existence of those allegations do not undermine the plaintiff's claims of wrongdoing on behalf of the corporation. Likewise, the defendant has no standing to assert claims on behalf of Linnea. If Linnea believes she has been deprived her fair share or waste is taking place by any party she can initiate any such action against them. It is improper to dismiss the derivative claims because Linnea has remained on the sidelines in this family dispute.

Furthermore, as noted, the allegations of the complaint are deemed true and the plaintiff is accorded the benefit of every possible inference (Sheppard v. United States Tennis Association Incorporated, 199 AD3d 846, 154 NYS3d 251 [2d Dept., 2021]). Consequently, mere denials of the allegations, no matter how emphatic, is not a basis upon which to dismiss the action. Thus, the defendant's repeatedly disputing the facts alleged by the plaintiffs does not mean the lawsuit has no merit. To be sure, this familial dispute is very contentious and allegations of wrongdoing have been asserted by all parties. However, there are no legal grounds to dismiss the action at this time where the facts are so vigorously contested. Further discovery will sharpen the issues and prepare the parties for trial.

Nevertheless, at this juncture, the motion seeking to dismiss the complaint is denied.

So ordered.

ENTER:

Dated: July 18, 2022
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC