

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

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DIAL CAR INC.,

Plaintiff,

Decision and order

- against -

Index No. 514138/20

TUCH & COHEN, LLP, PIKE, TUCH & COHEN LLP,  
PIKE & PIKE P.C., ROBERTA PIKE, KENNETH TUCH  
and LAURENCE COHEN,

Defendants,

October 18, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §2221 seeking to renew and reargue a decision and order dated February 10, 2021 dismissing the complaint. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in the prior order, in 2015 Yakov Guzman initiated a shareholder derivative action against Michael Kordonsky and Jeffrey Goldberg, members of the plaintiff corporation on the grounds they wasted corporate assets. The defendants represented Dial in that proceeding and the complaint alleged the defendants did not support the claims of Guzman but rather those of Kordonsky and Goldberg, which they allege harmed Dial. The court dismissed the complaint on the grounds all the causes of action failed to allege any improper conduct on the part of the defendants. The plaintiff has now moved seeking to reargue the dismissal of the causes of action for disgorgement, breach of fiduciary duty and aiding and abetting the breach of

such fiduciary duty. Further, the plaintiff has moved seeking to renew and to reinstate those causes of action. As noted, the defendants oppose the motion.

#### Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

The complaint asserts that "defendants breached their fiduciary duty to Dial, *inter alia*, by engaging in conflicts of interest and participating in a scheme to defraud Dial" (see, Complaint ¶ 176). Further, the complaint alleges the defendants aided Goldberg's own breach of fiduciary duty to Dial when Goldberg committed "fraud and malpractice upon Dial" (see, Complaint ¶ 171). While these allegations are insufficient and conclusory and cannot support any causes of action, the plaintiff asserts the allegations of the complaint generally support such causes of action and the court erred in not considering them.

Paragraph 46 of the complaint alleges that "Pike [the predecessor firm of the defendants] cleared Goldberg to be elected, without opposition, to the position of Vice President, despite the fact that Goldberg was not eligible for the position

under the Bylaws as Goldberg did not possess a Taxi and Limousine Commission License" (id). However, the complaint does not explain the role undertaken by Pike in this regard. Indeed, in the complaint in the derivative action it is alleged that "Kordonsky and/or certain of the other Officers and Directors orchestrated and ratified such election" (see, ¶63 of the complaint in *Guzman v. Kordonsky et al*, Index Number 512059/2015) without any mention of any role undertaken by Pike. Thus, the complaint fails to demonstrate that Pike breached any duty whereby Goldberg was elected vice president. Thus, there are facts in the complaint in this case which describe any breach of a duty committed by Pike. Rather, the complaint seeks to impose a breach of duty on Pike for actions undertaken by Goldberg and others which are alleged to have been improper. That is not a basis upon which to impose any breach of any duty. Likewise, all the other allegations raised do not really assert any breach of any fiduciary duty against the defendants. First, the failure to amend a pleading, even if true, is not a breach of a fiduciary duty. More importantly, that failure, if it was a failure, did not cause any harm to the plaintiff since subsequent counsel made such amendment.

Furthermore, there is no merit to the plaintiff's argument that a conflict of interest exists notwithstanding the lack of any malpractice claim and that such conflict of interest created


by the defendants is in fact a breach of a fiduciary duty. Indeed, the court thoroughly explained in the prior motion that no breach existed concerning Goldberg's retirement package or the fact the defendant's sought to dismiss the derivative action. The current motion does not argue that any of the conclusions reached were in error thus there is no basis upon which to grant reargument.

Therefore, based on the foregoing, the motion seeking to renew or reargue the prior decision is denied.

So ordered.

ENTER:

DATED: October 18, 2021  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC