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Decision of Interest
Business Law
Supreme Court, New York County, Part 59

BETTY BENAVIDES AND CINDY HO, SHAREHOLDERS OF AND SUING IN THE RIGHT OF 322 WEST 47TH STREET HOUSING DEVELOPMENT FUND CORPORATION, PLAINTIFFS V. CHASE MANHATTAN BANK, A/K/A JP MORGAN CHASE BANK, N.A., DEFENDANT, 602710/09

Justice Debra A. James
Cite as: Benavides v. Chase Manhattan Bank, 602710/09, NYLJ 1202482089410, at *1 (Sup., NY, Decided January 26, 2011)

Decided: January 26, 2011

DECISION

BACKGROUND

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Defendant Chase Manhattan Bank, a/k/a JP Morgan Chase Bank, N.A. (Chase) moves: (1) pursuant to CPLR 3211 (a)(7), to dismiss the complaint for failing to state a cause of action; and (2) pursuant to CPLR 8303 (a) and 22 NYCRR 130.1-1, for sanctions and reimbursement of Chase's costs and attorneys' fees.

Plaintiffs Betty Benavides (Benavides) and Cindy Ho (Ho), as majority shareholders, instituted this shareholders' derivative action, as shareholders of 322 West 47th Street Housing Development Fund Corporation (HDFC), against Chase to recover for a March 3, 2008, transfer of funds from one HDFC account maintained at Chase, opened by Benavides and Ho, which allegedly

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required two signatures on checks drawn from that account, to another HDFC account, opened by Marta Hauze (Hauze), a minority shareholder in HDFC, which only required Hauze's signature on checks.

This is the second suit brought by plaintiffs against Chase, the first suit having been dismissed by this court as against Chase on June 4, 2009, said decision having been filed with the County Clerk's Office on June 12, 2009.[FN1]

Chase maintains that the present suit should be dismissed based on the doctrine of res judicata, and also based on the fact that Benavides and Ho have failed to satisfy the prerequisites for commencing a derivative action, in that they failed to ask the board to act on the corporation's behalf or that such request would be futile. Further, Chase states that Benavides and Ho failed to demonstrate any injury, since the funds were transferred from one HDFC account to another HDFC account. In addition, Chase alleges that Benavides and Ho should be sanctioned, because they were previously orally warned by the court that it appeared that they were engaging in frivolous litigation and that their continuing to do so could result in sanctions.

In 2008, Benavides first brought suit against Hauze and two

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other defendants, index No. 102278/08 (Hauze Action). In that complaint, Benavides and Ho alleged that Benavides was elected president of HDFC in 1995, and remained as president until 2006, when Hauze, the owner of one-third of the shares of the corporation, was elected president. This complaint stated that, in May of 2007, Benavides was again elected president.

Benavides and Ho asserted that Hauze falsely represented herself as the corporation's president, that she illegally retained a management company, that she acted in contravention of HDFC's by-laws, and that she wrongfully executed checks from the corporation's account. On January 9, 2009, this court dismissed the complaint as against the two other defendants, and the Hauze Action is continuing as against Hauze.

In July, 2008, Benavides and Ho commenced an action against Hauze, HDFC, Chase, 10K Management, Inc., Rachel D. Jaffe, Aurore C. DeCarlo, and Housing Conservation Coordinators a/k/a H.S.C. Management Corp, index No. 602078/08 (Action 1). In Action 1, Benavides and Ho alleged the same causes of action as against Hauze in the Hauze Action, and also asserted that Chase failed to reverse the transfer of the funds from the HDFC account opened by Benavides and Ho and allowed the funds to remain in a different HDFC account. Benavides and Ho alleged that Chase failed to require two signatures on the check before the transfer, thereby

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illegally converting the funds.[FN2] In Action 1, Benavides and Ho sought punitive damages as against Chase in the sum of one million dollars, based on Chase's 'knowing and intentional, willful and malicious' transfer of the subject funds. As stated above, this court dismissed Action 1 as against Chase in its entirety, as well as dismissing the suit as against several of the other defendants.

The current action was commenced by Benavides and Ho on September 1, 2009. The causes of action alleged in the instant suit are: (1) breach of contract in Chase's failure to require two signatures on the check transferring the funds; (2) breach of fiduciary relationship between Chase and HDFC; and (3) civil conspiracy between Chase and Hauze. In Action 1, Benavides and Ho similarly alleged that Chase was liable to HDFC for failing to require two signatures on the check that transferred the funds, and the general allegations of Hauze's actions in both complaints are virtually identical.

Chase notes that Benavides and Ho failed to appeal the order of this court dismissing their complaint in Action 1 as against Chase.

In opposition, Benavides and Ho provide an affidavit of Benavides, in which she re-asserts the arguments that

appear in

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the complaint, and maintains that Chase's failure to require two signatures on the check, as mandated by the Business Depository Resolution and Bank Resolution filed with Chase, is both a breach of contract and a breach of a fiduciary obligation. Benavides maintains that Chase was aware of the discord between Benavides, Ho and Hauze, and, therefore, should not have permitted the transfer of funds. The court notes that the opposition fails to address the res judicata argument proffered by Chase in its motion papers.

DISCUSSION

CPLR 3211 (a), governing motions to dismiss a cause of action, states that '[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:...(7) the pleading fails to state a cause of action....'

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (Leon v. Martinez, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts 'fit within any cognizable legal theory.' Id. at 87-88. Further, '[a]llegations consisting of bare legal conclusions...are not presumed to be true [or] accorded every favorable inference [internal quotation marks and citation omitted].' Biondi v. Beekman Hill House Apartment Corp., 257 AD2d 76, 81 (1st Dept

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1999), affd 94 NY2d 659 (2000).

Chase's motion to dismiss the complaint is granted.

The instant complaint is virtually identical, with respect to the facts alleged, to the complaint in Action 1 that was dismissed pursuant to CPLR 3211 (a) (7). That earlier decision was not appealed. In the current complaint, Benavides and Ho merely include additional theories of recovery based on the same facts previously enunciated. Moreover, the instant complaint adds nothing new of substance to the previous complaint, which was dismissed for failing to state a cause of action. Therefore, the present complaint is similarly properly dismissed. Beninati v. Nicotra, 239 AD2d 242 (1st Dept 1997); Flynn v. Sinclair Oil Corp., 20 AD2d 636 (1st Dept), affd 14 NY2d 853 (1964).

Furthermore, the present action is a shareholders' derivative suit, in which shareholders of HDFC are seeking to recover damages allegedly suffered by the corporation because the corporation itself is refusing to act. See Bansbach v. Zinn, 1 NY3d 1 (2003).

'Business Corporation Law §626 (c) requires that a shareholder bringing a derivative action seeking to vindicate the rights of the corporation allege, with particularity, either that an attempt was first made to get the board of directors to initiate such an action or that any such effort would be futile. The demand requirement rests on basic principles of corporate control-that the management of the corporation is entrusted to its board of directors, who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts. Therefore, the demand

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requirement is excused only when the complaint's specific allegations support the conclusion that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction [internal quotation marks and citations omitted].'

Wande v. Eisenberg, 60 AD3d 77, 79-80 (1st Dept 2009).

In the instant matter, not only does the complaint fail to meet these predicate standards, but the plaintiffs themselves assert that they are the majority shareholders in the corporation. Moreover, the court can discern no injury or damage to HDFC. The funds in question were transferred from one of HDFC's accounts to another of HDFC's accounts. The corporation was in no way deprived of its assets. Furthermore, a shareholders' derivative suit that alleges injuries to individual shareholders, as well as injuries to the corporation, mandates dismissal of the action. Lama Holding Co. v. Smith Barney Inc., 88 NY2d 413 (1996); Abrams v. Donati, 66 NY2d 951 (1985); Leonard v. Gateway II, LLC, 68 AD3d 408 (1st Dept 2009).

Based on the foregoing, the first cause of action, alleging a breach of the contract between Chase and HDFC is dismissed.

Similarly, the second cause of action, alleging a breach of fiduciary duty by Chase to HDFC and plaintiffs, is also dismissed. In addition to the reasons stated above, with respect to the requisites to maintain a shareholders' derivative action, the relationship between a bank and its depositor is a

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contractual one of debtor and creditor, and an action sounding in tort may only be maintained as against a bank if an independent duty, aside from the contractual one, exists between the bank and its depositor. Dobroshi v. Bank of America, N.A., 65 AD3d 882 (1st Dept 2009); Bank Leumi Trust Co., of New York v. Block 3102 Corp., 180 AD2d 588 (1st Dept 1992). No such independent duty exists in the case at bar.

The third cause of action, alleging a civil conspiracy, is dismissed as well, because New York law does not recognize such a cause of action. 85 Fifth Avenue 4th Floor LLC v. I.A. Selig, LLC, 45 AD3d 349 (1st Dept 2007).

Finally, with respect to that portion of Chase's motion seeking the imposition of sanctions, costs and attorney's fees, pursuant to CPLR 8303-a (c) (i) and 22 NYCRR 130-1.1, the court finds that plaintiffs have engaged in frivolous multiple litigation with no apparent purpose other than to harass Chase, and exercises its discretionary powers to grant Chase its costs and reasonable attorney's fees attributable to opposing the instant action. Nyitray v. New York Athletic Club of New York, 274 AD2d 326 (1st Dept 2000).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion to dismiss is granted and the complaint dismissed with costs and disbursements to defendant as

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taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of defendant's motion seeking the recovery of attorney's fees is severed and an assessment thereof is directed; and it is further

ORDERED that defendant is to serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

FN1. The earlier case, index No. 602078/08, was instituted against Chase and several other defendants.

FN2. Despite this allegation, the Business Depository Resolution attached as an unnumbered exhibit to plaintiffs' papers clearly states that funds may be withdrawn by any one person authorized to act for HDFC.
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END OF DOCUMENT