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Machaneinu, Inc. v Luria
2013 NY Slip Op 52197(U)
Decided on December 20, 2013
Supreme Court, Kings County
Demarest, J.
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Decided on December 20, 2013

Supreme Court, Kings County

Machaneinu, Inc., Plaintiff,

against

Chaim Luzer Luria, JOSEPH SCHREIBER, and BAISAINU, INC., Defendants.

504393/13

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Carolyn E. Demarest, J.

Plaintiff corporation is a not-for-profit entity which formerly operated a camp for children in a rural area of New York State. The instant suit against a 50% "shareholder"[FN1] and former employee and an alleged corporate competitor of the camp which has de facto succeeded to the business of plaintiff through the efforts of Luria, the 50% "shareholder" of plaintiff and manager of its business, was initiated by Leib Puretz (Puretz), as president of plaintiff. In response to [*2]plaintiff's motion for a preliminary injunction prohibiting defendants from using plaintiff's property and soliciting its clientele, which was denied from the bench following argument when it became apparent that such relief would be inappropriate in the present circumstances and that monetary damages would sufficiently compensate plaintiff, defendants have cross-moved to dismiss, pursuant to CPLR 3211(a)(3) and (7), contesting Puretz's authority to commence the action and contending that he was not the president of the plaintiff at the time the action was commenced in August, 2013. Defendants further argue that, even if Puretz was authorized, as president, to commence suit, that the duly-elected Board of Directors has subsequently directed that the matter be discontinued.

Puretz contends that he was the founder of the plaintiff corporation and invested $4,000,000 in the development of the camp. It is uncontested that Puretz was the president of plaintiff at least until May 25, 2013, when, defendants contend, he orally resigned at a Board of Directors' meeting. Plaintiff argues that the By-Laws of plaintiff require any resignation of an officer to be in writing, citing Article II, and that any oral resignation would therefore be ineffective. The provision to which Puretz refers, however, does not relate to officers, but applies, by its terms, only to directors. As defendants admit, Puretz, together with Chaim and Sara Luria, was one of the original directors and remained such at least until May 25, 2013, when he purportedly orally resigned that position. The only evidence of such oral resignation, which is disputed by Puretz, is the affidavit of Chaim Luria submitted in response to the motion for preliminary injunction. No minutes of such meeting

have been provided. Since an oral resignation as a director would be ineffective under the By-Laws, and there is no evidence of a written resignation, or of Puretz's removal by the other directors prior to commencement of suit in August, Puretz was a director at the time the action was commenced. Puretz also denies having orally resigned as president and insists he had the authority to commence this action at the time it was commenced. As Luria acknowledges, Puretz's status, either as president or as a director, was, at the least, uncertain at the time the action was commenced. The Court finds, based upon the documentary evidence and the complaint, which must be accorded deference on this motion to dismiss (*Goshen v Mutual Life Insurance Co.*, 98 NY2d 314, 326 [2002]), that Puretz had the authority, in August 2013, to commence this action.

However, defendants have adduced minutes of a Directors' meeting held October 8, 2013, in the office of their attorney, notice of which was given to Puretz by mail on October 2, 2013, at which Puretz was removed as a director for cause, based upon undisclosed mortgages he had place upon plaintiff's property ultimately resulting in foreclosure and sale in which plaintiff lost the real property on which the camp operated. David Kenner, who was participating in the meeting by telephone, was elected as a third director. It was then further resolved that the instant lawsuit, having never been authorized, be discontinued and that the attorney representing plaintiff take no further action unless directed by the new president, Chaim Luria.

The law generally presumes, in the absence of any contrary limitation in the By-Laws or by Board resolution, that the president of a corporation is vested with the authority to maintain a lawsuit on behalf of the corporation (*West View Hills, Inc v Lizau Realty Corp.*, 6 NY2d 344, 348 [1959]; *Matter of Paloma Frocks, Inc[Shamokin]*, 3 NY2d 572, 575-76 [1958]; *Rothman & Schneider, Inc v Beckerman*, 2 NY2d 493,497 [1957]; *Fischer v Maloney*, 43 NY2d 553,557 [1978]). However, it has been held, in circumstances similar to those at bar, that "[a]ny actual [*3]or implied authority which [the president] may have had . . . to commence this action was terminated when a majority of the board of directors . . . refused to sanction it" (*Sterling Industries v Ball Bearing Pen Corp.*, 298 NY 483, 490 [1949]).

Defendants contend that, regardless of whether Puretz was authorized to commence suit, and irrespective of the language of the By-Laws granting executive management responsibility to the president of plaintiff corporation, even prior to the October 8 meeting, in September 2013, a Board of Directors meeting was held, at which only the Lurias were physically present, during which Puretz was removed as a director and replaced by David Kenner and it was resolved that the instant lawsuit be discontinued. The minutes of this meeting, appended to defendants' opposition to

plaintiff's motion for a preliminary injunction, are dated September 17, 2013 and signed by Sara Luria as secretary. Also annexed to the opposition to the plaintiff's motion is a "Notice of Special Meeting of Directors" that was personally delivered to the last known residence of Puretz at 11:50 am on September 16, 2013, noticing the 3:30 pm meeting on September 17, 2013, in compliance with the By-Laws of the corporation which require only that notice of a special meeting of the Board of Directors "be given to each director. . . by telegram, written message or orally not later than noon . . . on the day prior to the meeting" (By-Laws, page 6, Meeting of the Board). Puretz has not denied receiving this notice or the notice of the special meeting held on October 8, noticed by mail on October 2, 2013, in compliance with the By-Laws. As the By-Laws clearly vest the management of the corporation in the Board of Directors and two of the three directors were present and voting, it would appear that the resolutions passed at such meeting are binding and effective to divest Puretz of the authority to maintain the suit. The By-Laws expressly provide, moreover, that the president's duty is to "see that all orders and resolution of the Board of Directors are carried into effect" (Article III).

It has recently been held that where, as in the instant case, a corporate entity is equally owned by two members or shareholders, and the suit is brought by one against the other claiming breaches of fiduciary duty and diversion of corporate assets, that the appropriate vehicle to address such grievances is not a direct action by the corporation against one of the 50% owners, but is a shareholder's derivative action brought by one of the shareholders, and that a direct action by the corporation must be dismissed (*Stone v Frederick*, 245 AD2d 742, 744-45 [3d Dept 1997]; *L.W. Kent and Co. Inc v Wolf*, 143AD2d 813, 814 [2d Dept 1988]; *see also Crane A. G. v 206 West 41st Street Hotel Assocs, LP*, 87 AD3d 174 [1st Dept 2011]).

Accordingly, defendants' motion to dismiss the instant action is granted without prejudice to commencement of a shareholder's derivative action.

This constitutes the decision and order of the court.

_____CAROLYN E. DEMAREST

JUSTICE OF THE SUPREME COURT

Footnotes

Footnote 1: The owners of not-for-profit corporations are members, rather than shareholders (see

Not For Profit Corporation Law §601 (NFPCL)).

Return to Decision List