EFiled: Aug 12 2016 03:16PM EDT
Filing ID 59415530
Case Number 250,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE JOSEPH PENAR FAMILY TRUST, by its Trustee Joseph Penar; THE WALDER FAMILY TRUST, by its Trustee, Cecile Donnamarie Newkirk; ALLEN COOPER, individually; SUE COOPER, individually; and THE ALLEN AND SUE COOPER TRUST, by its Trustees, Allen and Sue Cooper,	:	No. 250, 2016
Plaintiffs Below-Appellants,	:	Court Below: Court of Chancery of the State of Delaware
v.	:	C.A. No. 10441-VCG
JASEN ADAMS, DAVID HARTCORN, and BRIAN TOLLEFSON,	:	
Defendants Below-Appellees,	:	
and	:	
PREMIUM OF AMERICA, LLC, and PREMIUM HOLDING, LLC,	:	
Nominal Defendants Below-Appellees.	:	

REPLY BRIEF OF PLAINTIFFS BELOW-APPELLANTS

ROSENTHAL MONHAIT & GODDESS, P.A.
Norman M. Monhait (#1040)
Carmella P. Keener (#2810)
919 Market Street, Suite 1401
Citizens Bank Center
Wilmington, Delaware 19801
(302) 656-4433
Attorneys for Plaintiffs Below-Appellants

OF COUNSEL:

ZUCKERMAN SPAEDER
Cyril V. Smith
William K. Meyer
100 East Pratt Street
Suite 2440
Baltimore, Maryland 21202
(410) 949-1145

August 12, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Case **Page(s)**

STATUTES

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue on appeal is whether the Complaint[1] set forth the elements of Plaintiffs' claim – a "transfer of assets by the Premium Board to individual managers at a manifestly unfair price," Opinion at 13 – under Court of Chancery Rule 12(b)(6)'s liberal pleading standard. Instead of addressing that issue, Defendants attempt to read the Complaint's allegations in the light *least* (not *most*) favorable to Plaintiffs, and attack the Complaint because it fails to allege additional facts that are not elements of the claim. Neither tactic is permitted under Delaware law. The lower court's dismissal should be reversed.

[1] This Reply Brief will use the same abbreviations as Appellants' Opening Brief.

ARGUMENT

THE COMPLAINT SUFFICIENTLY ALLEGES THE ESSENTIAL ELEMENTS OF THE SELF-DEALING CLAIM

A. The Elements Of The Claim And The Standard On A Motion To Dismiss

The Court of Chancery stated in the Opinion:

> The Plaintiffs argue, and I agree, that a transfer of assets by the Premium Board to individual managers at a manifestly unfair price would not be an action done on behalf of Premium in good faith.

Opinion (Ex. 1 to Opening Brief) at 13,[2] cited at OB 12.[3] Although Defendants devote several paragraphs to "The Bad Faith Standard," AB at 10-11, they dispute neither this passage nor Plaintiffs' argument which the passage endorsed. Indeed, Defendants could not reasonably take issue with this description of the elements of Plaintiffs' claim.

The parties also agree on the standard for a motion to dismiss. It is one of "reasonable conceivability," in which the trial court must

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations . . . as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof. [AB at

[2] The Opinion uses "Premium" to refer to POA and PH collectively. Opinion at 12, n.54.

[3] Plaintiffs' Opening Brief is "OB at ____"; Defendants' Answering Brief is "AB at ____."

9-10, quoting *Central Mtg. Co. v. Morgan Stanley Cap. Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).]

B. The Complaint Easily Meets This Standard

1. Who Was On The Board?

Defendants first claim that the Complaint does not plead "who the board members were at the time of the Presumed Transaction [and] which of those board members voted in favor of the transaction . . . ." AB at 7. *See also* AB at 12 (". . . Appellants did not plead . . . which board members approved the transaction. . . ."); AB at 14 ("The [Complaint] does not plead how many directors were on the board when the Presumed Transaction was approved.")

That is not a fair reading of the Complaint. The first sentence of Paragraph 1 alleges that Messrs. Adams, Hartcorn and Tollefson "at the time of the challenged transaction constituted the board of managers" of POA. SAC ¶1 (A32-33). The Complaint later alleges that Defendants were "at all times relevant hereto, and insofar as Plaintiffs are aware" remain, members of POA's Board. SAC ¶¶3-5 (A35). The Complaint further alleges that "by the latter part of August 2013, the Boards of POA and PH consisted of Adams, Hartcorn, Tollefson and Bray. Some time later, Bray resigned from the Boards" (SAC ¶31 (A42)), and that the transaction had occurred by mid-October 2013 (SAC ¶33 (A42-43)). Paragraph 40 alleges that "Defendants

effected a self-dealing transaction. . . ." SAC ¶40 (A44). Paragraphs 49, 60 and 73 allege that Defendants appropriated POA's assets for the benefit of Adams and Hartcorn. SAC ¶¶49, 60, 73 (A46-47, A48, A51).

These allegations are explicit: Adams, Hartcorn and Tollefson were directors, and they approved the challenged transaction.[4] Indeed, despite the above-noted statements in their Answering Brief, Defendants acknowledge in a footnote that they understand the Complaint to allege that they approved the transaction at issue. AB at 6, n.2. And if there was any doubt whatsoever, *Central Mortgage* requires that "all reasonable inferences" be drawn in favor of the plaintiff, while accepting even "vague" allegations as well-pleaded, so long as defendant has notice of the claim. 27 A.3d at 537.

2. Who Received POA's Assets?

The Answering Brief also seeks to avoid the theory of the case by suggesting that the Complaint does not plead who received POA's assets. *E,g.*, AB at 7-8, 11-12. Not so. The first sentence of Paragraph 1 expressly charges that Defendants "appropriated for *their* personal benefit the assets of POA and/or its wholly-owned subsidiary PH." SAC ¶1 (A32-33) [emphasis

[4] As Plaintiffs acknowledged at OB 1 n.1, when the Complaint was filed Plaintiffs were uncertain as to whether Ms. Bray had approved the self-dealing transaction, and the Complaint therefore does not allege that she did. By contrast, Defendants (at AB 15) attempt to draw an inference *most favorable to them* that Ms. Bray was disinterested. Once again, *Central Mortgage* does not permit this.

added]. As the Opening Brief notes, the Complaint repeatedly identifies Adams and Hartcorn as the beneficiaries of the transaction. OB at 14-15. The Complaint also explicitly alleges that Tollefson received $100,000 for supporting the transaction. SAC ¶¶33, 40 (A42-43, A44). Defendants' references to "disinterested directors" (AB at 11, 14), as well as their invocation of *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (AB at 11), are meaningless in the context of these allegations.[5]

3. Were POA's Assets Sold For A "Manifestly Unfair Price"?

Defendants further seek to avoid Plaintiffs' theory of the case by endorsing the Court of Chancery's conclusion that the Complaint did not adequately plead unfair value. AB at 12-13. They treat Plaintiffs' fair value argument as premised solely on the difference between the aggregate amount POA members received (approximately $7 million, SAC ¶40 (A44)) and the distribution the TYRSS Proposal offered (approximately $8.75 million, SAC ¶21 (A39-40). AB at 12. Plaintiffs' Opening Brief, however, demonstrates that the factual allegations supporting Plaintiffs' unfair value assertion include that difference but are far more extensive, also including the following:

[5] For the reasons set forth in text, the Complaint leaves no doubt that, after the Transaction, Adams and Hartcorn owned POA's assets directly or indirectly. The identities of any intermediary entities between them and the assets are not elements of the cause of action.

- POA had $11.6 million cash on hand;
- V&B had concluded that POA could distribute to members $20 million over 10 years, plus a $14 million terminal distribution;
- POA had only $365,000 in current obligations;
- Pannella and Cyr turned down personal profit – the offered $100,000 payoff -- to reject the distribution the TYRSS Proposal offered;[6] and
- the discounted present value of POA's cash on hand plus V&B projected distributions far exceeded $7 million. OB at 18-20.

The Answering Brief does not even attempt to address the full range of fair value allegations in the Complaint; Defendants' meek assertion that "the SAC's fair value allegations are equally problematic" (AB at 12) is rhetoric rather than substance.[7]

Defendants also lament that the Complaint does not plead the minute details of the transaction. AB at 7-8, 11-12. As the Opening Brief

[6] Defendants' quotation from OB 20 (at AB 12) is misleading at best. The "well-pleaded fact demonstrating unfairness" to which OB 20 refers is not the difference between the aggregate distribution in the challenged transaction and what the TYRSS Proposal had offered, but rather "the fact that independent Board members eschewed personal profit to reject as inadequate the TYRSS Proposal (which offered to pay POA members more than they ultimately received) . . . ." OB at 20.

[7] Defendants' assertion, AB 12, that the Transaction is described solely by reference to the proposed TYRSS exchange that did not occur is simply wrong, and is another attempt to read the Complaint's allegations *against* Plaintiffs. Other paragraphs of the Complaint, as set forth above, identify the parties to the transaction, the value exchanged, and any other required elements of the claim.

demonstrates, OB at 11-21, however, the Complaint's allegations establish that:

- the challenged transaction occurred in a narrow timeframe;
- Defendants approved it;
- Adams and Hartcorn obtained POA's assets while POA's members received far less than they should have; and
- Tollefson accepted $100,000 for supporting his friends.

These essential facts establish the elements of the claim the Opinion describes at Page 13. The name of the entity receiving the assets, and the legal structure of that transaction, are interesting details, but they are not necessary elements of that claim. OB at 17-18.

4. Was Tollefson An Interested Director?

Defendants' argument that the Complaint permits a reasonable inference that Tollefson was disinterested, despite receiving $100,000 for voting to approve the challenged transaction, AB at 14, strains credulity beyond the breaking point. The Complaint alleges that Tollefson "received a $100,000 payment after the transaction was implemented, that this was "in return for his support" (SAC ¶33 (A42-43)), and that "Tollefson supported or acquiesced in the self-dealing because of his friendship with Adams and because of the $100,000 payment he received, favoring Adams and his own

interests over those of POA and its members." SAC ¶40 (A44). Those allegations cannot reasonably be read to permit an inference that Tollefson was disinterested.[8]

C. Defendants' Remaining Arguments Are Irrelevant, Or Support Plaintiffs' Claim

1. Defendants' Letter Is Evidence Of Their Bad Faith, But Nothing More

The Answering Brief also borrows at length from the Letter *authored by Defendants Adams and Hartcorn*[9] (AB at 6-7, 14) to argue that Defendants acted in good faith.[10] As explained above (pp. 3-5, 7-8 *supra*), Defendants were manifestly not "disinterested directors." Moreover, on a motion to dismiss, the Court could consider the Letter to determine what POA's members were *told* about the transaction, but not to establish *the truth of its contents* or whether Defendants acted in bad faith. *In re Santa Fe Pacific Corp. S'holders Litig.*, 669 A.2d 59, 69 (Del. 1995). At the pleading stage, the Letter must be seen for what it is: advocacy by proponents of the

[8] The fact that Bray is not a defendant is irrelevant. In any event, there was a good reason for her omission. *See* note 4, *supra*.

[9] The signature line on the Letter is "The Board of Managers." As demonstrated above pp. 3-4 and OB 13-14, the Defendants approved the transaction. Tollefson claims he resigned from the POA Board in September 2013. *See*, A73-74, n.1 and OB 16, n.12.

[10] The Answering Brief goes further, adding pro-Defendant "information" that is not in the Complaint. *See*, AB at 5, second paragraph after the first sentence, and the first sentence of the following paragraph.

transaction. Whether or not the statements in the Letter are true,[11] and, if true, are sufficient to support a determination of good faith, are matters for another day.

Two of Defendants' bullet points, however, bear noting in light of the Complaint's allegations which squarely contradict them. These points are that (1) the aggregate member distribution "of $7,015,000 is roughly equal to 3.3 times the net present value of the Company's assets" and (2) the aggregate distribution "is more than 2.5 times the aggregate value of the Company's shares, according to the most recent business valuation performed by the Company's independent professional advisors." AB at 7; *see also,* A67. These statements were obviously intended to persuade POA's members that they were receiving fair value.

The statement that ". . . $7,015,000 is roughly equal to 3.3 times the net present value of the Company's assets" implies that the net present value of POA's assets was approximately $2.1 million.[12] But POA's cash on hand, less current obligations, exceeded $11 million (SAC ¶¶24, 25 (A40)). Therefore, the statement implies that POA's insurance portfolio had a

[11] Plaintiffs are aware that documentary support exists for some of the assertions in the Letter. For reasons described in the Opinion, those documents are not part of the record. Opinion at 13-14, 19-21.

[12] $7,015,000 ÷ 3.3 = $2,125,758.

negative value of approximately $9 million.[13] That could not possibly be correct because, among other reasons, the next quoted bullet says POA's portfolio had a value of negative $300,000.[14] The latter statement is inconsistent not only with the prior bullet, but also with the clause that preceded it which refers to a valuation in the range of $3.4 to $3.8 million.

In addition, these two bullet points omit any reference to, and indeed cannot be squared with, the Complaint's allegations that Pannella and V&B "determined that POA could make at least approximately $20 million in distributions to members over 10 years with an additional terminal payment of at least $14 million at the conclusion of its business," (SAC ¶27 (A41)), and that POA's cash on hand – plus the V&B valuation discounted to present value as of October 2013 – substantially exceeded the asserted value of $7,015,000. SAC ¶40 (A44).

The Complaint alleges that the Letter's failure to mention the V&B analysis, about which Defendants knew (SAC ¶28 (A41)), was false and misleading (SAC ¶34 (A43)). That omission, and the inferences arising

[13] $11,000,000 - $2,125,758 = $8,874,242.

[14] This statement also cannot be correct because POA could abandon unprofitable policies. Any contracts which are not advantageous – because the premiums necessary to maintain the policy exceed the policy value -- can be allowed to lapse, leaving only those with favorable terms. SAC ¶25 (A40).

from these two bullet points, also supports the conclusion that Defendants did not act in good faith.

The Answering Brief's reference to the Letter's statement that the aggregate distribution to POA's members was $7,015,000 (AB at 7) undermines the Defendants' later assertion that the Complaint does not plead "what was the consideration for the Presumed Transaction." AB at 8. The unfair value exchange about which Plaintiffs complain is the difference between what POA's members received, and what Adams and Hartcorn took away. As to the former, the Letter says that POA's members collectively received approximately $7 million. As to the latter, the Complaint alleges that Adams and Hartcorn took cash on hand of approximately $11.5 million, reduced by current obligations of approximately $365,000, ***plus*** an insurance portfolio that V&B had determined would yield approximately $20 million in distributions over a 10-year period with an additional terminal payment of approximately $14 million. SAC ¶¶25, 27 (A40, A41).

Defendants' assertion that the Complaint does not plead "what was the consideration for the Presumed Transaction" (AB at 7) does not help them for additional reasons. The aggregate $7 million distribution POA members received is more than $4 million less than POA's cash on hand less current obligations. Therefore, if Adams and Hartcorn paid nothing for

POA's insurance portfolio, the fairness of the value exchange would be in question. If they paid something for POA's insurance portfolio, they did not intend that payment to be shared with POA's members. The Letter begins by characterizing the check that came with it as "a final distribution" (A65), and ends with the phrase "to conclude this journey in the most favorable terms for the Members" (A66). These statements make clear the distribution was final. To the extent Defendants suggest that they may have paid something for POA's insurance portfolio, they also withheld more than $4 million from the distribution to members, undermining their assertion of good faith.

2. A Books and Record Demand Was Not Required

Finally, it is irrelevant that Plaintiffs did not seek books and records pursuant to 6 *Del. C.* §18-305. The fact that more details could have been included in the Complaint does not make those details required. As Plaintiffs' counsel explained to the Court of Chancery, Plaintiffs believed they had sufficient information to plead their claims. *See* OB at 12-13, n.5. For the reasons set forth in the Opening Brief and above, Plaintiffs continue to believe that judgment to be correct.

CONCLUSION

The Complaint gives Defendants fair notice of a claim that Adams, Hartcorn and Tollefson did not act in good faith in connection with the challenged transaction, *Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979),[15] and cannot support a conclusion that Plaintiffs will not be able to prevail on any "set of facts that can be inferred from the pleadings." *Solomon v. Pathe Commun. Corp.*, 672 A.2d 35, 38 (Del. 1996). The Court of Chancery's decision should be reversed and the case remanded to the Court of Chancery for further proceedings.

ROSENTHAL MONHAIT & GODDESS, P.A.

/s/ Carmella P. Keener
Norman M. Monhait (#1040)
Carmella P. Keener (#2810)
919 Market Street, Suite 1401
Citizens Bank Center
Wilmington, Delaware 19801
(302) 656-4433

Attorneys for Plaintiffs Below-Appellants

[15] *See also Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-897 (Del. 2002); *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

OF COUNSEL:

ZUCKERMAN SPAEDER
Cyril V. Smith
William K. Meyer
100 East Pratt Street
Suite 2440
Baltimore, Maryland 21202
(410) 949-1145

August 12, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of August, 2016, a copy of the foregoing **Reply Brief Of Plaintiffs Below-Appellants** was served electronically through *LexisNexis File & ServeXpress* upon:

Stamatios Stamoulis, Esquire
STAMOULIS & WEINBLATT LLC
Two Fox Point Centre
6 Denny Road, Suite 307
Wilmington, Delaware 19809

K. Tyler O'Connell, Esquire
Travis J. Ferguson, Esquire
LANDIS RATH & COBB LLP
919 Market Street, Suite 1800
Wilmington, Delaware 19801

/s/ Carmella P. Keener
Carmella P. Keener (#2810)