EFiled: Jan 10 2018 08:21PM EST
Filing ID 61554888
Case Number 445,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELIZABETH MORRISON, Individually and on Behalf of All Others Similarly Situated,	:	No. 445, 2017
Appellant/ Plaintiff-Below, v.	:	CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 12808-VCG
RAY BERRY, *et al.*,	:	
Appellees/ Defendants-Below.	:	

ANSWERING BRIEF OF
APPELLEES/DEFENDANTS-BELOW
RAY BERRY AND BRETT BERRY

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DATED: January 10, 2018

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE(S)**

NATURE OF PROCEEDINGS

The independent directors of The Fresh Market, Inc. (the "Company") decided to sell the Company to an affiliate of Apollo Global Management, LLC ("Apollo"). The transaction was structured as a tender offer followed by a merger. The Company's stockholders overwhelmingly supported the transaction.

Two stockholders, Appellees/Defendants-Below Ray Berry and Brett Berry, rolled over their equity in connection with the transaction. Ray Berry was the Company's founder and, at the time of the transaction, he was the Chairman of the Board of Directors. He did not attend any of the meetings at which the Board of Directors decided to commence a sale process, evaluated the results of the sale process, or made the ultimate decision to sell the Company. Brett Berry is Ray Berry's son. He was a former director of the Company and had once served as the Company's Chief Executive Officer, but at the time of the transaction he was not affiliated with the Company. Ray Berry's daughter (Amy) owned more stock in the Company than either Ray Berry or Brett Berry. She was a *seller* in the transaction.

One of the Company's stockholders, the Appellant/Plaintiff-Below (hereinafter "Plaintiff") challenged the transaction in the Court of Chancery. Plaintiff attempted to assert claims against all of the Company's directors, including Ray Berry, for breach of fiduciary duty. Plaintiff also attempted to assert a claim

against Brett Berry for aiding and abetting his father's alleged breach of fiduciary duty.

Ray Berry and Brett Berry filed motions to dismiss. Ray Berry argued that Plaintiff failed to state a claim against him for breach of fiduciary duty. Brett Berry argued that Plaintiff failed to state a claim against him for aiding and abetting. Brett Berry also argued that the Court of Chancery lacked personal jurisdiction over him.

On September 28, 2017, the Court of Chancery (Vice Chancellor Glasscock) dismissed the action in its entirety on the ground that the disclosures made to the Company's stockholders had been accurate in all material respects, the stockholders had ratified the transaction, and the transaction therefore was not subject to further judicial review. The Court did not base its ruling on the alternative grounds for dismissal raised by Ray Berry and Brett Berry. Plaintiff then took this appeal.

SUMMARY OF ARGUMENT

1. Denied. For the reasons set forth in the answering brief filed by the other Appellees,[1] the trial court correctly applied *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015) to dismiss all of Plaintiffs' claims. But even if the Court were to conclude that *Corwin* does not apply, the Court should affirm the trial court's judgment with respect to Defendants Ray Berry and Brett Berry on the following alternative grounds, which were presented below but not reached by the trial court in the Opinion:

A. Even if one accepts as true all of the factual allegations made by Plaintiff in her Complaint, Plaintiff failed to set forth any coherent theory of liability for Defendant Ray Berry.

B. Even if one accepts as true all of the factual allegations made by Plaintiff in her Complaint, Plaintiff failed to set forth any basis for the claim that Defendant Brett Berry aided and abetted a breach of fiduciary duty.

C. The Court lacks personal jurisdiction over Defendant Brett Berry.

[1] In addition to presenting the alternative grounds for affirmance set forth herein, Ray Berry and Brett Berry also adopt the arguments made by the other Appellees, which should be deemed incorporated herein by reference.

STATEMENT OF FACTS[2]

On March 14, 2016, the Company announced that it had agreed to be acquired by Apollo. The stockholders other than Ray Berry and Brett Berry were offered the opportunity to sell their shares at a substantial premium (approximately 53% above the price that prevailed immediately before the first public disclosure that Apollo had made an offer for the Company, and approximately 25% above the price that prevailed immediately before the announcement of the agreement). Not surprisingly, the proposed transaction received overwhelming support from the Company's stockholders. Among the stockholders who chose to *sell* at the premium price was Ray Berry's daughter, Amy, who owned more stock in the Company than either Ray Berry or Brett Berry.[3]

[2] At this stage, the factual allegations in the Complaint below must be accepted as true. In reality, many of those allegations are made up out of whole cloth. Among the inaccuracies in the Complaint are the following: that the Berry Family initiated the contacts with private equity firms (A. 138 ¶ 5); that Ray Berry did not tell the Company about the discussions with private equity firms until after the Company received the first bid from Apollo on October 1, 2015 (A. 150 ¶¶ 42-44); and that Apollo or the Berry Family was the source of the leak to the press about Apollo's offer. (A. 154 ¶ 54.)

[3] Amy Berry, who is married to Michael Barry, owned 6.4 of the Company's outstanding common stock (A. 137 ¶ 3), compared to 4.2 percent for Ray Berry and 4.0 percent for Brett Berry. (B. 41, 45.) ("B" refers to the separate appendix filed by Ray Berry and Brett Berry.) The 9.8 percent of the stock that was rolled over in the transaction (A. 59, 62) consisted of the 4.2 percent owned by Ray Berry, the 4.0 percent owned by Brett Berry, and 1.6 percent owned by two trusts for which Brett Berry served as an investment adviser but did not have voting or investment power and disclaimed beneficial ownership. (B. 41, 45.)

The transaction was the result of a strategic review and then an auction process that together lasted approximately five months. Ultimately, a special committee consisting of three of the Company's independent directors (the "Special Committee"), assisted by expert advisors, entertained bids from more than thirty potential buyers before accepting the high bid, which was made by Apollo. During the strategic review and auction process, Ray Berry did not attend a single meeting of the Board of Directors or the Special Committee.

The Board of Directors (the "Board") did not decide to have the Special Committee engage in a sales process until early December 2015. By Plaintiff's own admission, in late November 2015, ***before*** the Board decided to have the Special Committee engage in a sales process, Ray Berry (through his counsel) provided the Board with a complete and accurate description of his discussions with Apollo. (*See, e.g.*, Appellant's Opening Brief at 18-19 & 21.) To the extent Plaintiff accuses Ray Berry of any lack of candor in what he told the Board about his discussions with Apollo (and those accusations are in any event meritless), by Plaintiff's own admission these were events that occurred ***before*** the Board, based on complete and accurate information, decided in early December 2015 to have the Special Committee engage in a sales process.

Throughout the auction process, from beginning to end, every prospective buyer was told truthfully that, if it made a proposal that was sufficiently attractive to the Company's independent directors, Ray Berry would be willing to speak with it about a rollover of the same equity that was ultimately rolled over for Apollo. There was no attempt to reduce any agreement about a rollover of equity to writing until the final days of the sales process, *after* Apollo had emerged as the high bidder. (A. 90.)

ARGUMENT

I. PLAINTIFF'S THEORY OF LIABILITY FOR RAY BERRY IS ILLOGICAL AND CONTRADICTORY

A. Question Presented

Should the dismissal of the claim against Ray Berry be affirmed on the alternative ground that the claim is based on inferences that cannot reasonably be drawn from the specific facts alleged in Plaintiff's Complaint?

This issue was preserved for appeal. (B. 12-17; 50-54.)

B. Scope of Review

This Court's review of this alternative ground for affirmance is *de novo*.

C. Merits of Argument

In the trial court, Plaintiff asserted that Ray Berry engineered the removal of the Company's CEO in January 2015 for the purpose of driving down the Company's stock price to create a "buying opportunity" for himself and whichever private equity "partner" he eventually might select. Plaintiff went so far as to include a section heading in one of her briefs that read "Ray Berry Fires the CEO and Tanks the Stock Price." (A. 212.) Given that Ray Berry had only one vote on the ten-member Board, and that his family had more to lose than anyone else if the stock price declined, this theory was particularly far-fetched. As one would expect, the trial court rejected it out-of-hand: "If true, Berry is the most ice-cold killer gambler of whom I am aware. Even on a motion to dismiss, however, I am

not required to accept such a scenario, which I do not find to be reasonably conceivable." Op. at 9, n.54.

On appeal, Plaintiff abandons the theory of liability that the trial court rejected. The theory of liability that Plaintiff ***does*** present against Ray Berry, however, continues to be illogical and contradictory. Specifically, Plaintiff contends that Ray Berry used his discussions with Apollo to coerce the Board of Directors into selling the Company, and to dissuade other potential buyers from making bids, and that he facilitated his scheme by ***hiding*** the full extent of his dealings with Apollo.[4]

There are so many logical flaws in this theory that it is difficult to know where to start. First, there is nothing wrong about a director, in his capacity as a stockholder, negotiating with a potential buyer of the company. *See, e.g., Citron v. Steego Corp.*, 1988 WL 94738, at *8 (Del Ch. 1988). Plaintiff does not take issue with this basic principle of Delaware law.

[4] In her eagerness to show that Ray Berry sought to coerce the Board and discourage competing buyers, Plaintiff points out that, on October 16, 2015, there was a press report about the discussions that Ray Berry and one other member of his family were having with Apollo. With no factual basis whatsoever, Plaintiff speculates that the press report resulted from a self-serving leak by either Apollo or the Berry Family. But the press report incorrectly identified Ray Berry's son-in-law Michael Barry, rather than Ray Berry's son Brett Berry, as the second family member who was involved. This elementary error precludes the possibility that the press report was based on a leak from Apollo or the Berrys, as opposed to, for example, one of the investment banks the Company was interviewing at the time.

Second, by Plaintiff's own admission, in late November 2015, *before* the Board decided to have the Special Committee engage in a sales process, Ray Berry (via an email from his counsel) provided the Board with a complete and accurate description of his discussions with Apollo. Indeed, counsel's November 28, 2015 email is the very evidence that Plaintiff cites (albeit fallaciously) in her effort to demonstrate that Ray Berry's earlier disclosures to the Board had not been completely accurate. (*See, e.g.*, Appellant's Opening Brief at 18-19 & 21.) Thus, by Plaintiff's own admission, the Board's decision to have the Special Committee engage in the sales process was made on a fully informed basis.

Third, if Ray Berry's goal had been to coerce the Board into selling the Company, or to dissuade other potential bidders from competing with Apollo, the last thing he would have done is *understate* the extent of his commitment to Apollo. Yet, that is exactly what Plaintiff asserts -- that, in his earliest disclosures to the Board, Ray Berry *understated* the extent of his commitment to Apollo. (*See, e.g., id*. at 18-19.) Plaintiff never even attempts to explain how this could have been part of a plan to *increase* the pressure on the Board or the disincentives for other potential bidders.

Fourth, the illogical nature of Plaintiff's theory of liability becomes particularly clear when one considers that Ray Berry's daughter Amy owned considerably more stock in the Company than Ray Berry did, and yet ultimately

was a *seller* to Apollo. Plaintiff is accusing Ray Berry of perpetrating a scheme that cost his daughter more than it allegedly profited him. Plaintiff fails to address this conundrum anywhere in her Opening Brief, and by itself it is fatal to her claim.

Faced with a motion to dismiss, a plaintiff is entitled to have courts draw reasonable inferences from the specific facts alleged -- but not to have courts engage in flights of fancy such as this. For all of the reasons listed above, the wild inferences that Plaintiff asks the Court to draw against Ray Berry simply do not follow rationally from the specific facts alleged in the Complaint. As a result, Plaintiff has failed to state a claim upon which relief may be granted. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) ("a trial court is required to accept only those reasonable inferences that logically flow from the face of the complaint") (internal quotation marks and citation deleted); *Malpiede* v. *Townson*, 780 A.2d 1075, 1083 (Del. 2001) ("Of course, the trial court is not required to accept every strained interpretation of the allegations proposed by the plaintiff"); *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988) (a plaintiff is not entitled to inferences "unless they are reasonable inferences").

Recognizing that her theory of liability does not make any sense, Plaintiff tries to compensate with inflammatory language. In the trial court, she repeatedly stated that Ray Berry "lied" to the other directors. (A. 215, 222, 233 & 237.) Now, before this Court, she doubles down and calls him both a "liar" and a

"predator." (*See, e.g.*, Appellant's Opening Brief at 18.) Stating conclusions in strident terms, however, is no substitute for pleading facts, and the specific facts pled in the Complaint provide no basis for inferring that Ray Berry did anything wrong. The Court should disregard this inflammatory language in evaluating the sufficiency of the Complaint.

II. PLAINTIFF'S THEORY OF LIABILITY FOR BRETT BERRY IS EQUALLY FLAWED

A. Question Presented

Should the dismissal of the claim against Brett Berry be affirmed on the alternative ground that the claim is based on inferences that cannot reasonably be drawn from the specific facts alleged in Plaintiff's Complaint?

This issue was preserved for appeal. (B. 17-19; 55-56.)

B. Scope of Review

This Court's review of this alternative ground for affirmance is *de novo*.

C. Merits of Argument

The only cause of action Plaintiff attempts to state against Brett Berry is a claim for aiding and abetting a breach of fiduciary duty. (A. 189.) The claim is founded on the conclusory assertions that (i) Brett Berry knew that the Board was being misled about the extent of the discussions with Apollo, and (ii) he knowingly contributed to the deception by allowing himself to be used as a surreptitious line of communication between Ray Berry and the private equity fund. (A. 189 ¶ 144.)

Again, these are not inferences that can reasonably be drawn from the facts pled in the Complaint. Given that Plaintiff does not plead that Brett Berry knew anything about what was said in the conversations between his father and representatives of the Company, she has pled no facts to support an inference that Brett Berry was aware that anyone was being misled about the Berrys' discussions

with Apollo. Nor was there anything suspicious or devious about a father in his mid-70s delegating discussions of family business to a son in his late 40s, and the delegation here was particularly unremarkable given that Brett Berry had been the CEO of the Company more recently than his father and owned almost as much of the Company's stock as his father.[5]

In order to state a claim against Brett Berry, Plaintiff must allege facts showing that he "knowingly" assisted in wrongdoing. *See Malpiede*, 780 A.2d at 1096. For the reasons set forth above, Plaintiff's pleading fails to meet that burden.

[5] Brett Berry owned approximately 4.0 percent of the outstanding common stock, compared to approximately 4.2 percent for Ray Berry.

III. THE COURT LACKS PERSONAL JURISDICTION OVER BRETT BERRY

A. Question Presented

Should the dismissal of the claim against Brett Berry be affirmed on the alternative ground that the Court lacked personal jurisdiction over him?

This issue was preserved for appeal. (B. 10-12; 56-57.)

B. Scope of Review

This Court's review of this alternative ground for affirmance is *de novo*.

C. Merits of Argument

In the trial court, Brett Berry established by affidavit that he has no contacts with the State of Delaware. (B. 21-24.)

In her Complaint, the basis Plaintiff identified for exercising personal jurisdiction over Brett Berry was that he allegedly was a party to an agreement in which he consented to the exercise of jurisdiction in this State. (A. 147 ¶ 34.) When Brett Berry pointed out that Brett Berry was not in fact a party to the agreement in question, Plaintiff changed her tune. When she opposed Brett Berry's motion to dismiss, she stated that (i) she was relying on the conspiracy theory of personal jurisdiction, (ii) aiding and abetting is sufficient to establish the existence of a conspiracy, and (iii) the requisite contact with Delaware was supplied by the fact that it was foreseeable that the certificate of merger would be filed in Delaware. (A. 248-251.)

As Plaintiff conceded below, however, the requisite contact with Delaware only exists if the action in the state is taken *by one of the alleged co-conspirators*. (A. 249.) Here, the Complaint contains no allegation that the merger certificate was filed by one of the alleged co-conspirators. Nor could it, since the certificate presumably was filed by counsel for the Company, whereas Brett Berry is accused of having conspired with his father to victimize the Company. For this reason alone, Plaintiff's attempted reliance on the conspiracy theory of personal jurisdiction is misplaced. *See, e.g., Virtus Capital L.P. v. Eastman Chemical Co.*, 2015 WL 580553, at *15 (Del. Ch. 2015) (in order for filing of merger certificate to constitute act in furtherance of conspiracy, it must have been filed by one of the alleged co-conspirators). The dismissal of the claim against Brett Berry should be affirmed on the alternative ground that the Court lacked personal jurisdiction over him.

CONCLUSION

For all the reasons set forth above and in the Answering Brief filed by the other Appellees, Ray Berry and Brett Berry respectfully request that this Court affirm the ruling of the Court of Chancery.

DATED: January 10, 2018

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CERTIFICATE OF SERVICE

I, John L. Reed, hereby certify that on this 10th day of January, 2018, I caused true and correct copies of the foregoing **ANSWERING BRIEF OF APPELLEES RAY BERRY AND BRETT BERRY** to be served upon the following counsel of record in the manner indicated:

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