Bezio v General Elec. Co.
2020 NY Slip Op 34299(U)
December 23, 2020
Supreme Court, New York County
Docket Number: 653132/2018
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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ROBERT BEZIO, FLOYD MIKLIC,

Plaintiff,

- v -

GENERAL ELECTRIC COMPANY, JEFFREY IMMELT, JEFFREY BORNSTEIN, JAN HAUSER, FIDELITY MANAGEMENT TRUST COMPANY, JOHN DOES 1-5

Defendant.

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INDEX NO. 653132/2018

MOTION DATE 01/31/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 77, 78

were read on this motion to/for DISMISS.

Upon the foregoing documents, for the reasons set forth on the record (12-17-2020) and as otherwise discussed below, the plaintiffs' Second Amended Derivative Complaint (the **SADC**), which amounts to the plaintiffs' third attempt to state a claim against the defendants in this action (*see* NYSCEF Doc. Nos. 1, 18, 57),[1] is dismissed because the plaintiffs have again failed to make a demand on the trustee and have again failed to adequately allege demand futility. In short, the trustee is a directed trustee not responsible for the performance of the assets and inasmuch as the plaintiffs dismissed this action against the trustee with prejudice, they have removed issues of conflict of interest leaving open liability for the trustee only for failing to bring an action once demand is made if in fact the trustee should bring such a claim. Although the trustee can be removed by the Named Fiduciary, *Velez v Feinstein,* 87 AD2d 309 [1st Dept

[1] The plaintiffs voluntarily dismissed this action with prejudice against the trustee, Fidelity Management Trust Company (NYSCEF Doc. No. 46).

1982]) does not dictate a different result because unlike in *Velez* where the union could remove the trustee, the Named Fiduciary is not GE and, on the record before the court, the plaintiffs have failed to allege with particularity the domination and control of the Named Fiduciary so as to demonstrate control over the Named Fiduciary and the trustee.

The full facts of this matter are set forth in the court's prior decision and order dated November 16, 2019 (the **Prior Decision;** NYSCEF Doc. No. 54). As the court explained in its Prior Decision when it previously dismissed the Amended Derivative Complaint:

> The critical issue which dooms the plaintiffs' case is whether the beneficiaries of a trust established pursuant to the Employment Retirement Savings Plan Act of 1974 (**ERISA**) must make a demand on the trustee or adequately plead demand futility in order to maintain a derivative action. Because the court answers this question in the affirmative and the plaintiffs have failed to do so, the defendants' motion pursuant to CPLR 3211(a)(5) is granted and the action is dismissed without prejudice, except as otherwise provided below.

(*id.* at 1).

With respect to demand and demand futility, the Amended Derivative Complaint alleged one single paragraph:

> 406. Demand on the Trustee of the Plan to bring this action is not required. In the alternative, if demand on the Trustee is required, demand is futile as the Trustee of the Plan is a named party in this derivative action. Further, the Trustee is conflicted as it would not sue its employer – GE. Therefore, demand on the Trustee is futile.

(NYSCEF Doc. No. 18, Amend. Der. Compl., ¶ 406).

As the court explained in its Prior Decision, this was inadequate.

Now, the SADC alleges the following four additional paragraphs:

436. Under the Trust Agreement, FMTC is appointed by the GEAM Committee, and it "***may be terminated in full***, or with respect to only a portion of the Plan, ***at any time by the Named Fiduciary*** . . . ." *See* Trust Agreement at Section 9(b) (Emphasis added). The Named Fiduciary[5] is the GEAM Committee[6] and the BPIC.[7] Such control over FMTC thus relieves Plaintiffs of any obligation to make a demand on FMTC to sue Defendant GE because it is GE that appoints FMTC and can at will remove FMTC. As this Court previously noted "[t]he court in Velez [*Velez v. Feinstein*, 87 A.D.2d 309 (1st Dep. [sic]1982)] found that the complaint sufficiently pled demand futility where the trustees under the trust agreement were appointed by the union and could be removed and replaced at will by the union's executive board: 'such control excuses demand on the trustees to sue the union that appoints and can at will remove them' (*Velez*, 87 AD2d at 317)." *See* Decision + Order on Motion, NYSCEF Doc. No. 64 at 7.

437. Any demand on FMTC to bring a Securities Act claim on behalf of the Plan is therefore futile.

* * *

438. Defendants' counsel admit that a demand upon FMTC to bring suit against Defendant GE under Section 11 of the Securities Act of 1933 would be futile since they expressly argue that Plaintiffs and their fellow employees do not possess any such cause of action. At the October 16, 2019 hearing before the Court, Defendants' counsel admitted in relevant part:

> THE COURT: So let's say they had made a demand that you say was required and the trustee decided no, no, no we're not bringing a Section 11 claim. Putting aside whether or not that constitutes the correct exercise of responsibility and business judgment and all of those other things that they relate to the trust under the circumstances which trust incidentally was a party to this case some time ago but got dismissed with prejudice, and I know you want to talk to me about that, too.
>
> MR. DANILOW: No.
>
> THE COURT: I got it. But putting that aside for a minute, under those circumstances if the plan participants were bringing -- if Mr. Bezio and Mister -- I apologize if I'm pronouncing the names wrong -- Mr. Miclik were suing derivatively at that point, ***would you still be telling me that ERISA would prevent a claim because it's not enumerated in 1132?***
>
> MR. DANILOW: ***Yes, Your Honor***.
>
> THE COURT: All right.

> MR. DANILOW: And, again, then they made a demand and if it's -- if they think the trustees have breached their duties they have recourse and 502(A) gives them recourse.
>
> THE COURT: That's against the trustees. That's not recourse against the securities laws.
>
> MR. DANILOW: **That is correct.**
>
> THE COURT: ***So, then there is no recourse under the securities laws as given your hypothetical is what I was getting at under Section 11 issues on behalf of the beneficiaries regardless of whether or not they made the demand. The demand is irrelevant.***
>
> ***MR. DANILOW: The beneficiaries cannot bring, either directly or derivatively, a claim that is not listed in 502(A).*** And, again, I think that's what ERISA says. We can debate wisdom or fairness. That is our position and we believe that's what the statute says on its face.
>
> THE COURT: I understand what you're saying. I just want to make sure.
>
> MR. DANILOW: Fair point. Yes. That is our position.

See Bezio, et al. v. General Electric Company, et al., Index No.: 653132/2018, Oral Argument Transcript at 16:4-25 – 17:1-18 (NYSCEF DOC. NO. 52) (Emphasis added).

439. For purposes of this amended complaint, Defendants are thus estopped from arguing that Plaintiffs have not made a proper demand on the Trustee to bring a Section 11 claim on behalf of the Plan because Defendants' counsel argue that no such cause of action exists under ERISA.

(NYSCEF Doc. No. 63, SADC, ¶¶ 436-439 [all emphasis in original]).

The remainder of the SADC is, in sum and substance, virtually unchanged from the amended derivative complaint and these additional allegations do not make the SADC any less wanting. Defense counsel's proffered belief at oral argument as to what claims may or may not be brought directly or indirectly under ERISA by the trust beneficiaries against the GE defendants is simply ***not*** a basis to allege demand futility. Stated differently, the issue with the plaintiffs' demand futility allegations is that there is simply "no basis in this record to assume that the ***Trustee(s)***

will not meet its fiduciary obligation in evaluating a demand to bring suit" (NYSCEF Doc. No. 54, Prior Decision at 12 [emphasis added]). Nothing alleged in paragraphs 436 to 439 of the SADC in any way affects that determination.

The concern addressed by pleading demand futility centers on the potential conflict of interest by trustees in bringing a lawsuit against the company in which they themselves may be held liable (*Velez,* 87 AD2d 309). As the Appellate Division noted in *Velez*, under the trust agreement in that action, the trustees were appointed by the union and could be removed and replaced at will by the executive board of the union (*id.* at 317). Such control, thus, "excuses demand on the trustees to sue the union that appoints and can at will remove them" (*id.*). The *Velez* court also recognized that different directors/trustees may have different potential conflicts (*Velez, supra* [noting that the union head is different than other potential trustees]). Here, the particularized facts show that the trustees were ***directed*** trustees and were not responsible for the performance of the trust assets, and this action was voluntarily dismissed by the plaintiffs against the trustee with prejudice (NYSCEF Doc. Nos. 46-47). Accordingly, the plaintiffs have effectively removed issues of conflict of interest as to the trustee and have only left open the potential liability for failing to bring a claim when the trustee would be in breach of its fiduciary duties. To wit, if anything, under the facts of this case and based on the actions of the plaintiffs, demand is anything but futile.

This case also is markedly different than *Velez*. There is no direct line between GE and the trustee unlike the union in *Velez*. Previously, the plaintiffs argued that GE and Jeffrey Immelt (who has been dismissed from this action with prejudice per the court's Prior Decision) controlled the trustees without pleading any facts with particularity (*Velez,* 87 AD2d 309). Now,

the plaintiffs again make this argument, only this time arguing that the trustee can be removed by the Named Fiduciary (hereinafter defined), and, as such, demand is futile. The trustee under the trust agreement is appointed by the Trustees of the GE Savings and Security Program (the **GEAM Committee**) and may be terminated by the Named Fiduciary. The **Named Fiduciary** is the GEAM Committee, the trustees of which have their own fiduciary duties, and the Benefits Plan Investment Committee (**BPIC**). It is not GE. In their opposition papers, the plaintiffs argue that because the GEAM Committee is comprised of high-ranking GE employees and is a Named Fiduciary of the Plan appointed by the BPIC, GE necessarily controls them. That argument, however, fails because it does not plead with particularity the domination and control of the Named Fiduciary so as to demonstrate control over the Named Fiduciary and the trustee. Accordingly, the SADC must be dismissed.

Based on the holding above, the court need not reach another issue raised by defendants seeking dismissal of the SADC. Relying on cases that, among other things, held that § 502 (a) of ERISA provides the exclusive vehicle for actions asserting a claim by an ERISA plan beneficiary as to retirement benefits, defendants argue that this action is barred by § 502 (a) of ERISA (29 USC § 1132[a]), which they claim grants ERISA plan participants and beneficiaries standing to assert only those claims that are expressly delineated in § 502 (a), whether related to employment benefits or not – and defendants argue that § 502(a) does not list §§ 11 and 12 of the Securities Act of 1933. Although this issue need not be addressed, none of the cases cited by defendants stands for the broad proposition of preemption advanced by defendants. The Court does, however, note that the Second Circuit has acknowledged that *Diduck v Kaszycki & Sons Contractors, Inc.* (874 F2d 912 [2d Cir 1989]) has not survived later Supreme Court rulings (*see Gerosa v Savasta & Co., Inc.*, 329 F3d 317, 322 [2d Cir 2003]).

Finally, and for the avoidance of doubt, the court's Prior Decision dismissed all claims against three former GE officers as time-barred, with prejudice (NYSCEF Doc. 54 at 14-15). The court did not leave open the possibility for an amended pleading with respect to these individual defendants and the claims against the individual defendants may not be asserted. In light of the foregoing, the court also need not address the branch of the defendants' motion seeking a stay.

Accordingly, it is

ORDERED that the motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to the defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendants.

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12/23/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE