262 A.D.2d 968
Supreme Court, Appellate Division,
Fourth Department, New York.

Matter of Alyse LAZAR, Robin Lazar–Miller and Elliot Lazar, Petitioners–Respondents,
v.
ROBINSON KNIFE MANUFACTURING CO., INC., Respondent–Appellant.
Alyse Lazar, Robin Lazar–Miller and Elliot Lazar, Plaintiffs–Respondents,
v.
John Greenberger, Mona Skerker, as Executrix of the Estate of Bernard Skerker, Deceased, Larry Skerker, Robert Skerker, Joan L. Skerker and Robinson Knife Manufacturing Co., Inc., Defendants–Appellants.

June 18, 1999.

Shareholders brought suit against corporate directors, seeking equitable relief for alleged fraud, illegality and breach of fiduciary duty in adopting stock option plan. The Supreme Court, Erie County, Notaro, J., denied motion to dismiss complaint, and directors appealed. The Supreme Court, Appellate Division, held that exclusivity provision of statute authorizing dissenting shareholders to bring appraisal action upon corporate merger did not bar suit.

Affirmed.

West Headnotes (3)

[1] **Corporations and Business Organizations**
⇐ Ultra vires transactions or wrongful use of power

Corporations and Business Organizations
⇐ Exclusive remedy

Exception to exclusivity rule prohibiting dissenting shareholder who has commenced appraisal proceeding upon corporate merger from enforcing other shareholder rights allows dissenting shareholder to bring action as individual for equitable relief to remedy unlawful or fraudulent corporate conduct. McKinney's Business Corporation Law §§ 623, 623(k), 910.

Cases that cite this headnote

[2] **Corporations and Business Organizations**
⇐ Stock options;backdating

Corporations and Business Organizations
⇐ Exclusive remedy

Exclusivity provision barring shareholders who have brought appraisal proceeding upon corporate merger from bringing additional claims based on shareholder rights did not bar suit against corporate directors seeking equitable relief for alleged fraud, overreaching and breach of fiduciary duties in adopting stock option plan. McKinney's Business Corporation Law §§ 623, 623(k), 910.

Cases that cite this headnote

[3] **Corporations and Business Organizations**
⇐ Derivative action as distinct from direct or individual action in general

Action alleging that directors breached fiduciary duty owed to plaintiff shareholders individually in adopting stock option plan that diminished value of their stock was not derivative action brought on behalf of defendant corporation. McKinney's Business Corporation Law §§ 623, 623(k), 910.

Cases that cite this headnote

Attorneys and Law Firms

****540** Lawrence Schulz, Orchard Park, for respondent-appellant and defendants-appellants.

Joseph Zdarsky, Buffalo, for petitioners-respondents and plaintiffs-respondents.

PRESENT: PINE, J.P., LAWTON, PIGOTT, JR., and CALLAHAN, JJ.

Opinion

***969** MEMORANDUM:

[1] Supreme Court properly denied the motion of defendants to dismiss the complaint as barred by the exclusivity provision in Business Corporation Law § 623(k). Business Corporation Law §§ 623 and 910 authorize shareholders who dissent from the merger of two domestic corporations to commence an appraisal proceeding wherein the court determines the fair value of their stock. A dissenting shareholder who commences an appraisal proceeding generally is excluded from enforcing "any other right to which he might otherwise be entitled by virtue of share ownership" (Business Corporation Law § 623[k]). A narrow exception to the exclusivity rule is provided in Business Corporation Law § 623(k), which authorizes "a dissenting stockholder to bring an 'appropriate action' in his individual capacity to remedy unlawful or fraudulent corporate conduct" (*Breed v. Barton*, 54 N.Y.2d 82, 86, 444 N.Y.S.2d 609, 429 N.E.2d 128; *see also, Schloss Assocs. v. Arkwin Indus.*, 61 N.Y.2d 700, 472 N.Y.S.2d 605, 460 N.E.2d 1090, *revg. on dissenting opinion of Mangano, J.*, 90 A.D.2d 149, 158, 455 N.Y.S.2d 844). An appropriate action is one in which there is a "primary request" for equitable relief (*Breed v. Barton, supra*, at 87, 444 N.Y.S.2d 609, 429 N.E.2d 128).

[2] Here, petitioners/plaintiffs (hereinafter plaintiffs) commenced an appraisal proceeding and thereafter commenced the present action alleging fraud, overreaching and breach of fiduciary duties by the individual defendants, who were directors of defendant corporation, in their adoption of and participation in a 1990 stock option plan. The complaint seeks as one of its primary requests equitable relief, i.e., rescission of the stock option plan, the imposition ****541** of a constructive trust upon the stock issued under the stock option plan and an accounting. Moreover, if plaintiffs establish that a breach of fiduciary duty occurred, then the actions of defendants are unlawful and plaintiffs may be entitled to equitable relief (*see, Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 569, 483 N.Y.S.2d 667, 473 N.E.2d 19, *rearg. denied* 64 N.Y.2d 1041, 489 N.Y.S.2d 1028, 478 N.E.2d 211). Because plaintiffs allege that the actions of defendants were unlawful or fraudulent and seek equitable relief, the action is not barred by the exclusivity provision in Business Corporation Law § 623(k) (*see generally, Breed v. Barton, supra*, at 87, 444 N.Y.S.2d 609, 429 N.E.2d 128; *Matter of Willcox v. Stern*, 18 N.Y.2d 195, 204, 273 N.Y.S.2d 38, 219 N.E.2d 401; *Matter of Direct Medial DMI v. Rubin*, 171 Misc.2d 505, 654 N.Y.S.2d 986).

[3] Likewise, we reject defendants' contention that the present action is derivative and therefore should have been dismissed. The complaint alleges that plaintiffs' ownership interest in defendant corporation was diminished because of the breach by defendants of their fiduciary duties in issuing the stock option ***970** plan. Because plaintiffs allege that defendants breached a duty owed to them individually, this is not a derivative action brought on behalf of defendant corporation (*see, Matter of Schulman*, 165 A.D.2d 499, 503–504, 568 N.Y.S.2d 660, *lv. denied* 79 N.Y.2d 751, 579 N.Y.S.2d 651, 587 N.E.2d 289; *Hammer v. Werner*, 239 App.Div. 38, 44, 265 N.Y.S. 172; *see generally, Abrams v. Donati*, 66 N.Y.2d 951, 953, 498 N.Y.S.2d 782, 489 N.E.2d 751, *rearg. denied* 67 N.Y.2d 758, 500 N.Y.S.2d 1028, 490 N.E.2d 1234).

We have reviewed defendants' remaining contentions and conclude that they are without merit.

Order unanimously affirmed with costs.

All Citations

262 A.D.2d 968, 692 N.Y.S.2d 539, 1999 N.Y. Slip Op. 05993

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