

Ousted Founder Brings Claims Against Corporate Insiders

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In *Ogus v. SportTechie*, C.A. No. 2018-0869-AGB. (Del. Ch. Jan. 31, 2020), the Delaware Court of Chancery refused to dismiss portions of seven claims brought by the jilted founder of SportTechie Inc. against corporate insiders and investors related to his removal from office and the purported repurchase of his equity stake in the company.

SportTechie, a news website focused on the interplay between sports and technology, was co-founded in 2012 by Simon Ogus and Taylor Bloom. In 2015, SportTechie was reorganized as a Delaware limited liability company, with Ogus owning 44.5% and Bloom owning 55.5% of the company. In October 2016, Oak View Group, a private equity fund, invested in SportTechie in exchange for a convertible note and a seat on the company's board of directors. Later that year, SportTechie was converted to a Delaware corporation at the urging of Bloom, Daniel Kaufman, the company's general counsel, and Francesca Bodie, Oak View's soon-to-be designee on the company's board of directors. Under the company's limited liability company agreement, Ogus' consent was required and obtained for both the Oak View investment and the conversion to a corporation. In connection with the conversion, Ogus also executed a written consent appointing Bloom, Bodie and a third individual (but not himself) to the SportTechie board. Finally, Bloom and Ogus executed a shareholders agreement that allowed SportTechie to repurchase Ogus' shares within 90 days after the termination of his employment for any reason or no reason at a purchase price equal to the fair market value of the shares (as determined by the board).

Shortly after the transactions described above, SportTechie engaged a financial adviser to determine the fair market value of the company for the purpose of a potential buyout of Ogus' equity stake. A month later Bloom and Bodie, purporting to act by written consent on behalf of the board, removed Ogus as an officer and terminated him without cause. The company then purported to exercise its option pursuant to the shareholders agreement to repurchase Ogus' shares at the low end of the range of value provided in the financial adviser report.

Ogus filed suit, alleging a variety of fiduciary and contractual claims against Bloom, Kaufman, Bodie and Oak View. Ogus claimed that he had been fraudulently induced to agree to the transactions leading up to his ouster and that Bloom and Bodie, in their capacity as directors, had breached their fiduciary duties and their contractual obligations under the shareholders agreement.

Analyzing the fraud claims, the court held that Ogus had adequately pleaded that he had been fraudulently induced to approve the conversion and the board appointments, but that he had failed to state a claim with respect to his entry into the shareholders agreement. With respect to the conversion, Ogus alleged that Bloom and Kaufman had pressured him into executing the conversion documents in a short timeframe while representing to him that the business would be harmed if the conversion was not effected quickly and had misrepresented that after the conversion Ogus would retain management authority and his existing veto rights over major company decisions. Ogus also

claimed that Bloom and Kaufman repeatedly misrepresented that he would be added to the board shortly after the conversion in order to induce him to execute written consents appointing the other board members who would eventually facilitate his ouster. While the court found these allegations to be sufficient for purposes of pleading a fraud claim against Bloom and Kaufman, it dismissed fraud claims related to Ogus' entry into the shareholders agreement. Ogus argued that the ability of the company to repurchase Ogus' shares upon termination of his employment had been concealed from him, but these claims were dismissed because the plain terms of the shareholders agreement that Ogus had signed clearly gave the company the repurchase option.

The court also found that Ogus had adequately pleaded claims against Bloom and Bodie for breaching their fiduciary duties and their contractual obligations under the shareholders agreement in connection with his termination and the repurchase of his shares. In so doing, the court distinguished *Dweck v. Nasser*, C.A. No. 1353-VCL (Del. Ch. Nov. 23, 2005), which had held that a terminated CEO's claims were contractual in nature and that the board did not have an obligation under the circumstances to permit him to continue to manage the business. The court indicated that *Dweck* did not state a categorical rule that the dismissal of an officer or employee can never result in fiduciary liability, and concluded that under the circumstances here it had been adequately alleged that the board had acted in bad faith by terminating Ogus—not for reasons related to his service as an officer or employee—but solely as a means to trigger SportTechie's repurchase right under the shareholders agreement. The court declined to dismiss aiding and abetting claims against Oak View in connection with Ogus' termination, finding that the knowing participation of Bodie, Oak View's board designee, in the termination was imputed to Oak View for purposes of the motion to dismiss.

The court dismissed fiduciary claims related to the price at which Ogus' shares were repurchased, holding that the claim was contractual in nature given that the shareholders agreement provided a contractual good-faith standard of conduct for the board's fair value determination. The court did, however, find that Ogus had adequately alleged a breach of contract claim against the board for failing to satisfy the contractual good-faith standard because it had relied on a financial adviser report that the directors knew or should have known omitted information related to prior potential equity issuances.

The decision in *Ogus* highlights the fact that even corporate actions that may be legally permissible remain subject to equitable review under Delaware law. Here, corporate insiders allegedly took a series of legally permissible steps, many or all of which Ogus actively agreed to or approved, that resulted in Ogus being forced out of a company that he co-founded. While Ogus could be said to have participated in his own downfall (and could have prevented it if he had availed himself of his contractual veto rights to ensure his rights would be protected in the post-conversion entity), the court was willing to accept, at least at the motion to dismiss stage of the proceedings, that the corporate insiders who allegedly orchestrated the scheme may have engaged in fraud in doing so and may have breached fiduciary and contractual duties to Ogus along the way.

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