2017 IL App (1st) 16-3213-U

THIRD DIVISION
September 27, 2017

No. 1-16-3213

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WILLIAM A. PETTIT and SUSAN VAN HOUTEN, on behalf of themselves and others similarly situated,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division.
Plaintiffs-Appellants,	)	
v.	)	No. 2016 CH 06885
HD SUPPLY HOLDINGS INC.,	)	The Honorable Eileen Kathleen Kennedy, Judge Presiding.
Defendant-Appellee.	)	

JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.

Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

Held: The trial court properly dismissed the plaintiffs' class action on the basis that the action was barred by the forum selection clause in the defendant's certificate of incorporation, requiring any action involving the internal affairs of the corporation to be brought in the Delaware chancery court.

¶ 1 This cause of action arises from a class action law suit filed by the plaintiffs, William A. Pettit and Susan Van Houten, individually and on behalf of a putative class of other similarly situated former employee-shareholders, against the defendant company HD Supply Holdings Inc.

(HD Supply Holdings), alleging breach of contract, breach of the implied covenant of good faith and fair dealing, violations of the Illinois Wage Payment and Collection Act (820 ILCS 115/2 (West 2012)) and unjust enrichment in relation to the defendant's administration of an employee stock incentive plan (the plan). The trial court dismissed the plaintiffs' cause of action (735 ILCS 5/2-619 (a)(8) (West 2012)) pursuant to a forum selection clause in the defendant's certificate of incorporation designating the Delaware chancery court as the exclusive venue for actions governed by the internal affairs doctrine. The plaintiffs now appeal contending (1) that the forum selection clause is inapplicable because the plaintiffs' claims do not implicate the internal affairs doctrine; (2) the plan does not contain a venue provision; and (3) the certificate of incorporation was adopted after the plan. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 The record before us reveals the following facts and procedural history. The defendant, HD Supply, is a publicly traded Delaware holding company headquartered in Georgia, which engages in the business of industrial distribution through several affiliated companies and subsidiaries throughout North America.

¶ 4 The defendant's certificate of incorporation contains a forum selection clause, binding on all shareholders, which provides in pertinent part:

> "Exclusive Jurisdiction for Certain Actions. Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for *** (iv) any action asserting a claim against the Corporation governed by the internal affairs doctrine, in each such case subject to said Court of Chancery having personal jurisdiction over the indispensable parties named as defendants therein. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of

the Corporation shall be deemed to have notice of and consented to the provisions of this Article ***."[1]

¶ 5 Prior to October 2015, the defendant company conducted its business through four divisions, including HD Supply Power Solutions (Power Solutions). Two of the defendant's subsidiaries, HD Supply Management Inc., (Supply Management) and HD Supply Canada, Inc. (Supply Canada) employed Power Solutions' employees, including the plaintiffs.

¶ 6 The plaintiffs are former high-ranking members of the Power Solutions management team, who were granted certain restricted equity awards (stock awards and options) that were to vest at 25 percent annually over the course of four years, pursuant to the defendant's management equity program. This program was governed by an employee stock incentive plan (the 2013 Omnibus Incentive Plan), which was approved by the defendant and its shareholders on June 26, 2013.

¶ 7 The plan is administered by an "administrator,"--the Compensation Committee of the defendant's Board of Directors--which has the authority to decide all claims related to the plan's benefits and rights and whose "decision is final and conclusive and binding on all persons."

¶ 8 While the plan specifies that any disputes arising from the plan are governed by the "laws of the state of Delaware," it does not contain a venue provision.

¶ 9 Relevant to this appeal, the plan also contains a provision governing the treatment of the

[1] We note that according to the record, the defendant filed its second amended and restated certificate of incorporation with the Securities and Exchange Commission (SEC) on June 13, 2013. The certificate became effective upon the completion of the company's initial public offering on July 2, 2013, and was filed with the Delaware secretary of state on that same date.

Applicable equity awards in the event of a "change of control." In that respect, the plan provides that upon "a change of control" of the company, "all such awards shall vest and become non-forfeitable and be cancelled in exchange for an amount equal" to the price of the securities on the date there is a "change in control" of the company. The plan defines "change of control" as:

> "the merger, consolidation or other similar transaction involving the Company, as a result of which persons who were holders of voting securities of the Company immediately prior to such merger, consolidation, or other similar transaction do not, or any of the Investors, does not, immediately thereafter beneficially own, directly or indirectly, more than 50% of the combined voting power entitled to vote generally in the election of directors of the merged or consolidated company[.]"

The plan defines "Company" as the defendant, "HD Supply Holdings, Inc., a Delaware corporation, and any successor."

¶ 10 On July 2015, several of the defendant's wholly-owned subsidiaries[2] entered into a purchase agreement with Anxiter, Inc. (Anxiter) pursuant to which Anxiter agreed to acquire Power Solutions for $825 million. The defendant was not party to this agreement. The sale was completed on October 5, 2015. Through the sale Anixter purchased all equity interests of three of the defendant's subsidiaries[3] and "certain specified assets of the [two wholly-owned subsidiary] Sellers and certain affiliates of the Sellers." Anxiter, however, did not purchase any equity interest of the defendant company.

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[2] These included HD Supply, Inc., HD Supply Holdings, LLC, HD Supply GP & Management, Inc., HD Supply Power Solutions Group, Inc. and Brafasco Holdings II, Inc.

[3] These included HD Supply Power Solutions, Ltd., HDS Power Solutions, Inc., and Pro Canadian Holdings I, ULC.

¶ 11 As part of the sale, the plaintiffs and other Power Solutions employees were terminated from their positions with Power Solutions, and in most cases, were immediately rehired, by Anxiter. At that same time, all of the plaintiffs' unvested equity awards were cancelled and declared worthless.

¶ 12 On December 21, 2015, the plaintiffs and more than a dozen members of their class filed a formal claim for themselves, and others similarly situated, asserting that under the plan upon the sale of Power Solutions to Anxiter, they were entitled to the accelerated vesting of their "restricted shares and stock options." In doing so, they asserted that under the plan, that sale constituted a "change in control" of the company.

¶ 13 On April 14, 2016, the plan administrator denied the plaintiffs' claim, finding in relevant part, that: (1) the sale did not constituted a "change in control of the Company" as defined in the plan; and (2) any unvested awards previously granted to Power Solutions employees were forfeited and cancelled upon the termination of their employment after the completion of the sale to Anxiter.

¶ 14 On May 18, 2016, the plaintiffs filed the instant class action law suit in the circuit court of Cook County, against the defendant alleging: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) violations of the Illinois Wage Payment and Collection Act (820 ILCS 115/2 (West 2012)); and (4) unjust enrichment. With respect to all four counts, the plaintiffs alleged that the defendant's cancellation of their unvested stock options and restricted equity awards violated the plan.

¶ 15 On July 25, 2016, the defendant filed two separate motions to dismiss, pursuant to sections 2-615 and 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (a)(9) (West 2012)). In its section 2-619(a)(9) motion to dismiss (735 ILCs 5/2-

619(a)(9) (West 2012)), the defendant argued that: (1) the forum selection clause in the defendant's certificate of incorporation required that the case be litigated in Delaware; and (2) the claims were contractually time-barred. In its section 2-615 motion to dismiss (735 ILCs 5/2-615 (West 2012)), the defendant argued that the plaintiffs had failed to sufficiently state all four of their causes of action.

¶ 16 On October 11, 2016, after hearing oral arguments the trial court dismissed the complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-219(a)(9) (West 2012)), holding that the forum selection clause in the defendant's certificate of incorporation mandated that the cause be litigated in the Delaware chancery court. In doing so, the court noted that "the crux of this case" involved whether "a change of control" occurred, which fell squarely within the internal affairs doctrine, so as to trigger the venue provision in the certificate of incorporation. In addition, the court found that "option contracts involve the internal affairs of the corporation."

¶ 17 The plaintiffs filed a motion to reconsider on November 9, 2016, which was denied. The plaintiffs now appeal contending that the trial court erred in dismissing their complaint on the basis of the forum selection clause in the defendant's certificate of incorporation.

¶ 18 II. ANALYSIS

¶ 19 We begin by noting that a motion to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 2012)) admits the legal sufficiency of the complaint (*i.e.*, all facts well pleaded), but asserts certain defects, defenses or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20; *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). The existence of a forum selection clause is an "affirmative matter," which may warrant dismissal under section 2–619(a)(9) of the Code (735 ILCS 5/2–619(a)(9) (West 2010)). See, *e.g.*, *Walker v. Carnival*

Cruise Lines, Inc., 383 Ill.App.3d 129, 131 (2008); *Dace International, Inc. v. Apple Computer, Inc.*, 275 Ill.App.3d 234, 237 (1995). Our review of the circuit court's grant of a motion to dismiss pursuant to section 2-619 is *de novo*. *Relf*, 2013 IL 114925, ¶ 21.

¶ 20 On appeal, the plaintiffs contend that the forum selection clause in the defendant's certificate of incorporation is inapplicable because their causes of action do not implicate the internal affairs doctrine, so as to trigger that venue provision. They argue that this is a simple breach of contract dispute between former employees and their employer, which has no implication on the internal affairs of the corporate defendant. For the reasons that follow, we disagree.

¶ 21 The internal affairs doctrine developed on the premise that, in order to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions, but, rather should rest with one state, *i.e.*, the state of incorporation. *VatnagePoint Venture Partners 1996 v. Examen, Inc*., 871 A. 2d 1108, 1112-13 (Del. 2005). It is well-settled that "[t]he internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officer, directors and shareholders." *VatnagePoint*, 871 A.2d at 1113 (Del. 2005); see also *Mariasch v. Gilette Co*., 521 F.3d 68, 72 (2008) (defining "internal affairs" as "matters peculiar to the relationship among and between a corporation and its *** officers, directors, and shareholders." (Internal quotation marks omitted.)) (citing *Edgar v. MITE Corp*., 457 U.S. 624, 645 (1982); see also Restatement (Second) of Conflict of Laws § 302, Comment a (1971) (defining "internal affairs" as the "relations *inter se* of the corporation, its shareholders, directors, officers or agents").

¶ 22 Courts have repeatedly held that claims against a corporation based on "stock option plans

are considered matters pertaining to the internal affairs of the corporation." See *Mariasch*, 521 F.3d at 72 (applying the internal affairs doctrine to employee's suit against corporation regarding employee's right to exercise expired non-qualified stock options pursuant to employee stock option plan); *Elster v. Am. Airlines, Inc*., 100 A. 2d 219, 224 (Del. Ch. 1953) (applying the internal affairs doctrine to a suit arising from the grant of stock options and seeking to enjoin the corporation from honoring the exercise of option rights, or to otherwise cancel them; holding that "[t]his action *** relates to stock options granted to certain officers and personnel of defendant. It is not therefore an ordinary transaction for the sale of stock on the open market, but involves a matter lying entirely within the corporate structure of the defendant"), *rev'd on other grounds sub nom. Beard v. Elster*, 160 A.2d 731 (Del. 1960); *Munson Trans., Inc. v. Hajjar*, 148 F.3d 711, 713-14 (7th Cir. 1998) (applying the internal affairs doctrine where a corporation sought a declaration that the former employee had no right to exercise stock options); see also *Cohen v. Ayers*, 449 F. Supp. 298, 303, 306 (N.D. Ill. 1978) (determining that the internal affairs doctrine governed claims attacking the administration of company stock option plans related to option cancellations and re-grants) *aff'd*, 596 F.2d 733 (7th Cir. 1979).

¶ 23 Contrary to the plaintiffs' assertion, the mere characterization of their claims as actions involving a breach of contract, does not render the internal affairs doctrine inapplicable. Rather, application of the doctrine turns on whether the dispute at issue implicates the relationship between a corporation and its shareholders.

¶ 24 In the present case, all of the plaintiffs' claims are premised on the failure of their stock options to accelerate and vest upon the sale of Power Solutions to Anxiter. The resolution of whether the acceleration should have occurred depends on the plan administrator's interpretation of the term "change of control in the Company" as defined under the plan. Since that plan

defines a "change of control," as "the merger, consolidation or other similar transaction" involving the defendant company and having a direct impact on the voting power of prior security holders, and company investors, there can be no doubt that the interpretation of "change of control" involves the internal affairs of the defendant corporation. In addition, the plaintiffs' claims here directly challenge the plan administrator's decisions to cancel their stock awards upon the sale. Since it is undisputed that the plan administrator here is also a committee of the defendant company's Board of Directors, it directly implicates the relationship between the corporation and its shareholders. Accordingly, we find no error in the trial court's determination that the forum selection clause in the defendant's certificate of incorporation was triggered so as to require litigation of these issues in the Delaware chancery court.

¶ 25 In coming to this decision, we find the plaintiffs' reliance on the decision in *Boilermakers Local 154 Ret. Fund v. Chevron Corp*. 73 A.3d 934 (Del. Ch. 2013) misguided. In *Boilermakers*, the court held that in accordance with section 109(b) of Delaware's General Corporation Law (Del. Code Ann. tit. 8, § 109(b) (2012)) forum selection bylaws may regulate where stockholders can bring internal affairs doctrine cases, *i.e*., "cases of the kind that address the business of the corporation, the conduct of its affairs, and *** the rights or powers of its stockholders, directors, officers or employees." *Boilermakers*, 73 A.3d at 951-52. The court in *Boilermakers* explained that "[b]y contrast, the bylaws would be regulating external matters" beyond the scope of the statue if they sought to bind a stockholder plaintiff seeking to bring either "a tort claim against the company based on a personal injury" or "a contract claim based on a commercial contract with the corporation" because such claims "would not deal with the rights and powers of the plaintiff-stockholders as a stockholder." *Boilermakers*, 73 A.3d at 952.

As the court further clarified, external matters include those that "extend[] beyond the contract that defines and governs the stockholders' rights." *Boilermakers*, 73 A.3d at 952.

¶ 26 Contrary to the plaintiffs' position, *Boilermakers* does not hold that forum selection bylaws may not apply to anyone bringing a tort or contract claim against a corporation. Instead, *Boilermakers* makes abundantly clear that it is not the type of claim raised, but rather the "subject matter of the actions" that controls whether the cause of action is governed by the internal affairs doctrine. *Boilermakers,*73 A.3d at 951-52.

¶ 27 Under the express rationale of *Boilermakers*, the plaintiffs' claims here, premised on the stock option plan, *i.e.,* "the contract that defines and governs the stockholder's rights" are inherently internal to the defendant company, and therefore would permit forum selection bylaws to dictate where the cause should be litigated. *Boilermakers*, 73 A.3d at 952.

¶ 28 In rejecting the plaintiffs' claims, we have also reviewed the decisions in *Raybuck v. USX, Inc.*, 961 F.2d 484 (1992) and *Lewitton v. ITA Software, Inc*., 2008 WL 4427512 (2008) and find them inapposite. Both of those decisions involved breach of contract suits that affected only a single plaintiff, and had no impact on the internal affairs of the corporation. *Raybuck* involved the narrow interpretation of an individual employee-shareholder's agreement, and whether that plaintiff-employee had breached the agreement when he left to work for a competitor, in this manner automatically canceling his stock options under an unambiguous term of that agreement. *Raybuck*, 961 F.2d at 485, 487. *Lewitton* similarly involved the construction of a single employee's employment letter, and not the construction of a stock option plan. *Lewitton*, 2008 WL 442512, *5.

¶ 29 In stark contrast, in the present case, as already detailed above, the administrator's

interpretation of the plan, namely whether under that plan the sale of a subsidiary business unit constitutes a "change in control" of the defendant company and what treatment should be accorded to unvested stock options upon that sale, affects the relationship between the company and its shareholders. A decision on the plaintiffs' claims affects the number of shares forfeited upon such a sale, and thus the shares available to the defendant company for future allocation. It thereby also affects the company's ability to undertake other transactions, such as asset sales and sales of other subsidiary business units. As such, contrary to what the plaintiffs would have us find, such a decision implicates the defendant's internal affairs. See *e.g.*, *Mariasch*, 521 F. 3d at 74 (explaining that a construction of a stock option plan affects "the boards' authority over the issuance of stocks."); see also *Manicelli v. Momentum Research, Inc.*, 2012 WL 1810192 (N.C. Sup. Ct. 2012) (holding that a plaintiff's breach of contract claim under a shareholder agreement or a pre-incorporation agreement is a dispute related to the issuance of shares, and therefore involves the relationship between the corporation and its shareholders so as to fall within the internal affairs doctrine); see also *Fredericks v. Georgia-Pacific Corp.*, 331 F. Supp. 422, 424 (E.D. Pa. 1971) (holding that the internal affairs doctrine applied to a suit to recover under a written stock option contract alleging wrongful refusal to permit the plaintiff to exercise options because "courts have uniformly held that the validity and construction of stock options" is a matter that involves the internal affairs of a corporation).

¶ 30 The plaintiffs next assert that even if their claims implicate the internal affairs doctrine, so as to trigger the forum selection clause, we should not apply that clause so as to bar their claims in Illinois because: (1) the plan itself does not contain a venue provision; and (2) the certificate of incorporation containing the clause was adopted after the plan. For the reasons that follow, we disagree.

¶ 31 Contrary to the plaintiffs' assertion, the fact that the plan does not contain a forum selection provision is irrelevant. It is a fundamental principle of Delaware corporate law that by acquiring shares or options in a corporation, a shareholder assents to the corporate framework and a corporation's certificate of incorporation. See e.g., *Boilermakers*, 73 A.3d 934, 940 (Del. Ch. 2013) (The Delaware Supreme Court "has long noted that bylaws, together with the certificate of incorporation and the broader D[elaware]G[eneral]C[orporate]L[aw], form part of a flexible contract between corporations and stockholders."); accord *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders***"); *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) ("[A] corporate charter is both a contract between the State and the corporation, and the corporation and its shareholders."); 8 Del. Code Ann. § 394 (2012) ("This chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation.").

¶ 32 By acquiring shares and options, the plaintiffs here assented to the certificate and its forum selection clause. As such, absent any alleged wrongdoing that would justify the invalidation of the forum selection clause, which the plaintiffs have not alleged, we are compelled to enforce the clause See *e.g.*, *Ingres Corp. V. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) ("Forum selection clauses are presumptively valid and should be specifically enforced unless the resisting party clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching.").

¶ 33 The plaintiffs assert that we should not enforce the forum selection clause because the plan was adopted six days before the certificate went into effect, so as to deprive them of notice of that clause. The timing of the amendment to the certificate of incorporation, however, has no

bearing on the enforceability of the forum selection clause. A corporation may amend its certificate of incorporation "from time to time, in any and as many respects as may be desired," and any such amended is "effective upon its filing date." Del. Code Ann. tit. 8, § 103, 242(a) (2012). Likewise, a corporation may restate its certificate of incorporation "whenever desired" and "thenceforth the restated certificate of incorporation, including any further amendments of changes made thereby, shall be the certificate of incorporation of the corporation[.]" Del. Code Ann. tit. 8, § 245(a), (d) (2012). Since the amended certificate of incorporation including the forum selection clause became effective on July 2, 2013, over two years before the plaintiffs' cause of action arose, the plaintiffs cannot now claim that they were without notice of the forum selection clause, or that it was somehow inapplicable to their cause of action.

¶ 34 Lastly, the plaintiffs argue, for the first time on appeal, that we should not enforce the forum selection clause because enforcement would be "unreasonable" and "unjust." In support, they contend that none of the members of their putative class work or live in Delaware so that the cost of litigating the action there would prove "unreasonable" and "unjust." The plaintiffs, however, did not raise this issue before the trial court. In addition, in making this argument, they allege new facts not in the record, namely the states of residency and employment for all the members of their putative class. In contrast, the record below only contains the addresses of the two named plaintiffs. As such, we find that this issue is not properly before us and we may not consider it. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 473, 453 (2007) (" '[I]ssues not raised in the trial court are deemed waived and may not be raised for the first time on appeal' [Citation]."); see also *Paluch v. United Parcel Serv., Inc.*, 2014 IL App (1st) 130621, ¶ 23 (refusing to consider the appellant's argument because it "relies on facts outside of the record.")

¶ 35 III. CONCLUSION

¶ 36 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 37 Affirmed.